No. 16-54

Title:	Juan Esquivel-Quintana, Petitioner v. Jefferson B. Sessions, III, Attorney General
Docketed:	July 11, 2016
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(15-3101)
Decision Date:	January 15, 2016
Rehearing Denied:	April 12, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 11 2016	Petition for a writ of certiorari filed. (Response due August 10, 2016)
Aug 3 2016	Order extending time to file response to petition to and including September 9, 2016.
Aug 10 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 1 2016	Order further extending time to file response to petition to and including September 16, 2016.
Sep 16 2016	Brief of respondent Loretta E. Lynch, Attorney General in opposition filed.
Sep 28 2016	DISTRIBUTED for Conference of October 14, 2016.
Sep 28 2016	Reply of petitioner Juan Esquivel-Quintana filed. (Distributed)
Oct 24 2016	DISTRIBUTED for Conference of October 28, 2016.
Oct 28 2016	Petition GRANTED.
Nov 18 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 16, 2016.
Nov 18 2016	The time to file respondent's brief on the merits is extended to and including January 18, 2017.
Nov 22 2016	Motion to dispense with printing the joint appendix filed by petitioner Juan Esquivel-Quintana.
Dec 12 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Dec 12 2016	Consent the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Dec 16 2016	Brief of petitioner Juan Esquivel-Quintana filed.
Dec 22 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 22 2016	SET FOR ARGUMENT on Monday, February 27, 2017.
Dec 23 2016	Brief amici curiae of Immigrant Defense Project, et al. filed.
Dec 23 2016	Brief amici curiae of The National Immigrant Justice Center, et al. filed.
Dec 30 2016	Record requested from U.S.C.A. 6th Circuit.
Jan 18 2017	CIRCULATED.
Jan 18 2017	Brief of respondent Loretta E. Lynch, Attorney General filed. (Distributed)
Jan 31 2017	Record received from the U.S.C.A. Sixth Circuit. The record is electronic.
Feb 15 2017	Reply of petitioner Juan Esquivel-Quintana filed. (Distributed)
Feb 27 2017	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

May 30 2017	Judgment REVERSED. Thomas, J., delivered the opinion of the Court, in which all other Members joined, except Gorsuch, J., who took no part in the consideration or decision of this case.
Jul 3 2017	JUDGMENT ISSUED.

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16-54

No. 16-___

IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia, consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen is legal. Seven states have statutes criminalizing such conduct.

The question presented is whether a conviction under one of those seven state statutes constitutes the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Esquivel-Quintana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is reported at 810 F.3d 1019 (6th Cir. 2016). The opinion of the Board of Immigration Appeals, Pet. App. 28a, is reported at 26 I. & N. Dec. 469 (B.I.A. 2015). The decision of the Immigration Judge is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 15, 2016. The court of appeals denied a timely petition for rehearing en banc on April 12, 2016. Pet. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), provides in relevant part: "The term 'aggravated felony' means – (A) murder, rape, or sexual abuse of a minor."

Cal. Penal Code § 261.5 provides in relevant part:

> (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years . . . .

. . .

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

Other relevant provisions of the U.S. Code – specifically, 18 U.S.C. §§ 2241, 2243, and 3509 – are reproduced at Pet. App. 44a-66a.

STATEMENT OF THE CASE

The Board of Immigration Appeals (BIA) has deemed conduct that is *legal* under federal law, the Model Penal Code, and the laws of forty-three states and the District of Columbia to be an "aggravated felony" under the Immigration and Nationality Act (INA). Specifically, the BIA has held that the INA's subsection categorizing "sexual abuse of a minor" as an aggravated felony covers not only convictions for sexually abusive conduct toward victims under sixteen but also convictions in the seven states that proscribe consensual sex between a twenty-one-year-old and someone under eighteen. Two federal courts of appeals have expressly rejected this position and

another circuit has adopted reasoning that would demand it do the same. But four others, including the Sixth Circuit in a divided opinion here, have accepted the BIA's view.

A. Legal Background

1. The INA subjects lawful permanent residents who are convicted of certain crimes to adverse immigration consequences, including removal. *See* 8 U.S.C. § 1227(a). These noncitizens may typically seek discretionary relief to remain in the United States. *See id.* §§ 1158, 1182(h), 1229b, 1229c.

But relief from removal is not an option for lawful permanent residents convicted, under state or federal law, of a crime the INA classifies as an "aggravated felony." Lawful permanent residents (and other lawfully present noncitizens) convicted of an "aggravated felony" are ineligible for virtually all forms of discretionary relief from removal. *See id.* §§ 1158(b)(2) (no asylum), 1182(h) (no waiver), 1229b(a)(3) (no cancellation of removal), 1229c(a)(1) (no voluntary departure). And once removed from the United States, an "aggravated felon" is ineligible for readmission or naturalization. *Id.* § 1182(a)(9)(A).

2. The INA contains a list of types of criminal offenses – such as murder and drug trafficking – that constitute "aggravated felonies." 8 U.S.C. § 1101(a)(43). State laws defining certain crimes, however, sometimes differ from one another in their particulars, and from their federal analogs as well. Questions thus frequently arise concerning whether a conviction under a state law proscribing conduct seemingly similar to that referenced in the INA qualifies as an "aggravated felony."

To answer these questions, this Court employs the "categorical approach." Under that approach, courts must first determine the elements of the aggravated felony's "generic" definition of the crime. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). This definition is derived from the contemporary, "generic sense in which the term is now used in the criminal codes of most States," federal law, and the Model Penal Code. *Taylor v. United States*, 495 U.S. 575, 598 (1990). If the elements of the state statute of conviction fall within the generic definition, then the conviction constitutes an aggravated felony. *Id.* But if the state statute is "overbroad" – that is, if it criminalizes conduct that the generic federal definition does not – then a conviction under that statute is not an aggravated felony. *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013). Under this approach, then, the "facts underlying the case" are irrelevant; courts look solely to "the least of the acts criminalized" by the state statute and compare them to the elements of the generic federal definition. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010) (internal quotation mark and alteration omitted)).

Taylor illustrates the categorical approach at work. There, this Court considered whether a state burglary conviction satisfied the generic definition of "burglary." 495 U.S. at 579-80. Looking to criminal codes across the country and the Model Penal Code, this Court concluded that the "contemporary meaning of burglary" required that the perpetrator unlawfully enter into a "building or structure" with intent to commit a crime. *Id.* at 598-99 & n.8. But the

state statute under which the defendant had been convicted criminalized not only entries into buildings and structures but also unauthorized entries into vessels and railroad cars. *Id.* at 599. Accordingly, the state statute swept more broadly than the generic definition. And so, the defendant's conviction – regardless of the actual facts that led to it – could not be treated as one for "burglary" under the federal statute at issue. *Id.* at 602.[1]

Through analyses like this, the categorical approach brings uniformity to the law and relieves courts of the arduous – and sometimes impossible – task of discerning the exact facts underlying prior convictions. *Taylor*, 495 U.S. at 601; *see also Moncrieffe*, 133 S. Ct. at 1693 & n.11. The categorical approach's method of "err[ing] on the side of underinclusiveness," *Moncrieffe*, 133 S. Ct. at 1693, also "promote[s] efficiency, fairness, and predictability in the administration of immigration law," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

B. Factual and Procedural Background

1. When petitioner Juan Esquivel-Quintana was twelve years old, he moved to the United States with his parents and became a lawful permanent resident.

---

[1] There are more complicated variations of the categorical approach, such as the "modified categorical approach" and tools for dealing with "divisible" state laws. *Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 3-4). But this case involves the "straightforward" version of the approach where this Court discerns the elements of the "generic" offense referenced in the INA and "then lines up [the state-law] crime's elements alongside those of the generic offense[]" to see if the former are broader. *Id.* at 2-3.

Pet App. 3a; Certified Administrative Record (CAR) 217. His parents, four siblings, and much of his extended family currently live in the United States. CAR 217-18. All of them are either lawful permanent residents or U.S. citizens. *Id.*

Esquivel-Quintana had no trouble with the law until 2009, when, while living outside of Sacramento, California, he was charged with violating Cal. Penal Code § 261.5(c). That statute is among the strictest laws in the Nation proscribing sexual intercourse with persons who have not attained a certain age; the statute criminalizes sex with an individual "under the age of 18 years" whenever the age difference between the parties is more than three years. Cal. Penal Code § 261.5(c). According to the State's charging papers, Esquivel-Quintana had consensual sex with his sixteen-year-old girlfriend while he was twenty and twenty-one years old. CAR 66-67, 214.

The INA defines "aggravated felony" to include "murder, rape, or *sexual abuse of a minor.*" 8 U.S.C. § 1101(a)(43)(A) (emphasis added). Before Esquivel-Quintana was charged, the Ninth Circuit held that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc). Surveying federal and state laws on the subject, the Ninth Circuit determined that the generic definition of "sexual abuse of a minor" requires victims to be under sixteen and at least four years younger than the perpetrator. *Id.* at 1152-55. The least of the acts criminalized under Cal. Penal Code § 261.5(c) – consensual sex between a twenty-one-year-old and a person just shy of eighteen – falls outside of those generic elements.

Against this backdrop, Esquivel-Quintana pleaded no contest to the Cal. Penal Code § 261.5(c) charge. CAR 209. He was sentenced to ninety days in jail and five years' probation. Pet. App. 29a; CAR 209.

After completing his jail term, Esquivel-Quintana moved from California to Michigan to be closer to his family. CAR 217-18. In Michigan, as under federal law, the conduct underlying Esquivel-Quintana's California conviction is not a crime. *See* 18 U.S.C. § 2243; Mich. Comp. Laws § 750.520d.

2. The Government arrested Esquivel-Quintana in Michigan and initiated removal proceedings against him. The Government alleged that his California conviction constituted the "aggravated felony" of "sexual abuse of a minor." Pet. App. 3a.

Esquivel-Quintana urged the Immigration Judge (IJ) to follow the Ninth Circuit's reasoning in *Estrada-Espinoza* and declare that his conviction did not constitute "sexual abuse of a minor" under Section 1101(a)(43)(A). CAR 154. The Government reminded the IJ she was sitting within the Sixth Circuit and urged her to reject the Ninth Circuit's analysis. *Id.* 189-91. Specifically, the Government asked the IJ to hold that "sexual abuse of a minor" encompasses sexual activity with "anyone under the age of 18 years old." *Id.* 190. The IJ adopted the Government's position and ordered Esquivel-Quintana removed from the United States. *Id.* at 158, 195-96; Pet. App. 3a.

3. A three-member panel of the BIA affirmed. The BIA, like the IJ, began by acknowledging that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor" in the Ninth Circuit. Pet. App. 34a (citing *Estrada-Espinoza*, 546

F.3d at 1159). But the BIA stressed that it was "not bound" in this case by Ninth Circuit precedent. *Id.* 34a. The BIA then concluded that "outside of the Ninth Circuit," a conviction under Cal. Penal Code § 261.5(c) constitutes the "aggravated felony" of "sexual abuse of a minor." *Id.* 35a, 41a-42a.

In holding that a conviction under Cal. Penal Code § 261.5(c) necessarily falls within the generic definition of "sexual abuse of a minor," the BIA purported to apply the categorical approach. Pet. App. 33a. But the BIA ignored the fact that only seven states criminalize consensual sex between a twenty-one-year-old and someone almost eighteen, as California does. *See* Pet. App. 67a-68a (collecting state statues). And the BIA never asked whether federal law or the Model Penal Code criminalizes such conduct. If it had, it would have been forced to acknowledge that the federal statute criminalizing "sexual abuse of a minor" does not prohibit consensual sex with someone sixteen or older. 18 U.S.C. § 2243(a)(1). Nor does the Model Penal Code. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962).

Instead, the BIA looked to 18 U.S.C. § 3509, a statute that establishes procedural rules for child witnesses in criminal trials where the child has been a victim of, among other things, "sexual abuse." This statute defines "child" as someone under eighteen. *Id.* § 3509(2). Consequently, the BIA held that the word "minor" in Section 1101(a)(43)(A) must refer to someone under eighteen. Pet. App. 31a.

The BIA acknowledged that consensual sex involving sixteen- or seventeen-year-olds is not necessarily "abusive" – another requirement for

"sexual *abuse* of a minor." Pet. App. 38a-39a (emphasis added). But the BIA thought that such conduct is abusive "in certain circumstances," such as when "a 16-year-old high school student" has consensual sex with "his or her school teacher." *Id.* 35a & n.4. From this, the BIA concluded that "outside the Ninth Circuit," the generic definition of "sexual abuse of a minor" covers statutes criminalizing sex with someone under eighteen, so long as there is "meaningful" age differential between the two participants. *Id.* 35a, 39a.

Comparing those generic elements to California law, the BIA held that convictions under Cal. Penal Code § 261.5(c) necessarily constitute "sexual abuse of a minor." The California law criminalizes sex between someone under eighteen (the BIA's definition of "minor") and another person at least three years older – an age differential the BIA found "sufficient" to be "meaningful." Pet. App. 41a-42a.

4. A divided panel of the Sixth Circuit denied Esquivel-Quintana's petition for review. It noted that "[t]he Second, Third, and Seventh Circuits" have held that "sexual abuse of a minor" means engaging in a sexual act with anyone under eighteen, while "[t]wo circuits" – the Ninth and the Fourth – "have reached a different conclusion." Pet. App. 5a, 14a. The Sixth Circuit "join[ed]" the former camp. *Id.* 15a.

Like the BIA, the Sixth Circuit never canvassed state law or the Model Penal Code to ascertain a generic, contemporary definition of "sexual abuse of a minor." Nor did the majority ascribe much significance to the fact that the federal criminal code limits its definition of that offense to situations where the minor is under sixteen and at least four years

younger than the defendant. *See* Pet. App. 12a (referencing 18 U.S.C. § 2243). Instead, the majority simply declared that, because the INA does not explicitly cross-reference the federal criminal code or otherwise define the phrase "sexual abuse of a minor," the generic definition of that crime is "ambiguous." Pet. App. 11a.

Faced with that perceived ambiguity, the majority turned to whether to apply the framework in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires courts in certain settings to defer to agencies' "reasonable construction[s]" of ambiguous statutes. *Id.* at 840. The Sixth Circuit saw "compelling reasons" to apply the rule of lenity instead of *Chevron* – and thus to resolve the ambiguity here in Esquivel-Quintana's favor. Pet. App. 8a. But it did not do so. Citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), an environmental case where this Court afforded deference to the EPA's interpretation of a statute having both civil and criminal applications, *see id.* at 703-04 & n.18, the majority asserted it was "requir[ed] . . . to follow *Chevron* in cases involving the Board's interpretations of immigration laws." Pet. App. 10a.

Applying *Chevron*, the Sixth Circuit found the BIA's conclusion that Cal. Penal Code § 261.5(c) falls within the generic crime of "sexual abuse of a minor" to be "permissible." Pet. App. 11a-15a. In the majority's view, the BIA reasonably defined the word "minor" according to the federal statute (18 U.S.C. § 3509) establishing rules for child witnesses in sexual abuse prosecutions. *Id.* 11a-12a. The majority

acknowledged that the federal *criminal* statute proscribing "sexual abuse of a minor," 18 U.S.C. § 2243, defines "minor" as someone between twelve and sixteen. *Id.* 13a. But the majority found that definition unacceptable because it does not cover "abuse against an eleven-year-old" – although the majority later conceded that a neighboring criminal statute, 18 U.S.C. § 2241, titled "aggravated sexual abuse," covers such conduct with persons under twelve. *Id.* 13a-14a.

Judge Sutton wrote an opinion concurring in part and dissenting in part, concluding that Esquivel-Quintana's conviction was not an "aggravated felony." He deemed this case a "classic occasion for applying the rule of lenity" because it involves an ambiguous statute with criminal and removal consequences, and this Court instructed in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that "whether we encounter [such a statute] in a criminal or noncriminal context, the rule of lenity applies." Pet. App. 21a, 24a (quoting *Leocal*, 543 U.S. at 11 n.8). Indeed, applying *Chevron* to statutes with both criminal and immigration consequences, he warned, "threatens a complete undermining of the Constitution's separation of powers," *id.* 22a (quoting *id.* 9a), and denies people "fair notice of criminal consequences," *id.* 22a. Finally, Judge Sutton saw nothing in *Babbitt* precluding this conclusion. The opinion in that environmental case, he explained, "expressly limits itself to 'facial challenges'" to agency regulations. *Id.* 24a.

5. The Sixth Circuit denied Esquivel-Quintana's petition for rehearing en banc. Pet. App. 43a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals are intractably divided over whether convictions under state statutes criminalizing consensual sex between a twenty-one-year-old and a person under eighteen constitute "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the INA. Indeed, they are divided over whether a conviction under the very state statute at issue in this case – Cal. Penal Code § 261.5(c) – constitutes "sexual abuse of a minor." Resolving this conflict is critical for millions of lawful permanent residents and other lawfully present noncitizens, as well as for litigants and courts struggling to discern in immigration and criminal proceedings when this provision of the INA applies. The Sixth Circuit's holding here is also wrong. Convictions under Cal. Penal Code § 261.5(c) and parallel state laws are not what Congress had in mind when it categorized "sexual abuse of a minor" as an "aggravated felony" under the INA. And even if there were any doubt on Section 1101(a)(43)(A)'s meaning, the Sixth Circuit should have resolved that ambiguity by ruling in favor of the noncitizen, not by deferring to the Board of Immigration Appeals (BIA).

I. The Courts of Appeals Are Intractably Divided Over Whether Convictions Under State Statutes Criminalizing Sex Between Twenty-One-Year-Olds and Persons Under Eighteen Constitute "Sexual Abuse of a Minor" Under the INA.

1. The courts of appeals are divided four-to-three over whether convictions under state statutes like Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor."

a. In addition to the Sixth Circuit's holding here, the Seventh Circuit has held that the BIA has permissibly concluded that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor." *Velasco-Giron v. Holder*, 773 F.3d 774, 779-80 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). The Seventh Circuit acknowledged that "most states treat persons 16 and older as adults for the purpose of defining sex offenses." *Id.* at 778. But it nonetheless concluded – over the dissent of Judge Posner – that the meaning of "sexual abuse of a minor" was ambiguous, and that "no matter how many states use a different age demarcation," the BIA's position is entitled to *Chevron* deference. *Id.* at 776-78. *But see id.* at 780-83 (Posner, J., dissenting).

The Second and Third Circuits likewise deem convictions for having sex with a person less than eighteen to constitute "sexual abuse of a minor." In *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001), the Second Circuit found Section 1101(a)(43)(A) to be ambiguous and then concluded that the BIA's definition of "minor" as someone under the age of eighteen is reasonable and entitled to *Chevron* deference. *Id.* at 55-60. And in *Restrepo v. Attorney General*, 617 F.3d 787 (3d Cir. 2010), the Third Circuit "agree[d]" with this analysis. *Id.* at 796.[2]

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[2] Although the Fifth Circuit has not squarely weighed in on the question presented, its precedent indicates it would likewise hold that a conviction like Esquivel-Quintana's falls within Section 1101(a)(43)(A). The Fifth Circuit has held that if statutes criminalizing sex with minors define "minor" as a person under eighteen, they "comport with the generic meaning of 'minor'" in Section 1101(a)(43)(A). *Contreras v. Holder*, 754

b. In direct contrast, an eleven-judge en banc panel of the Ninth Circuit unanimously held in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008), that convictions under Cal. Penal Code § 261.5(c) do not constitute "sexual abuse of a minor." *Id.* at 1160. The Ninth Circuit began by observing that federal law criminalizes consensual sex only when the minor is under sixteen and is at least four years younger than the defendant. *Estrada-Espinoza*, 546 F.3d at 1152 & n.2 (discussing 18 U.S.C. § 2243). The Ninth Circuit next observed that the Model Penal Code and the law in "the vast majority of states" also dictate that "consensual sexual intercourse with a 17-year-old . . . is not necessarily abusive under the ordinary, contemporary, and common meaning of 'abuse.'" *Id.* at 1153 (footnote omitted). Given the clarity with which all of these sources exclude sex between twenty-one-year-olds and persons almost eighteen from the generic meaning of "sexual abuse of a minor," the Ninth Circuit held that "*Chevron* deference does not apply." *Id.* at 1157 n.7. When "Congress has spoken directly to the issue, as it has here, our inquiry is over." *Id.*

After *Estrada-Espinoza*, the Ninth Circuit explained that its reference in that opinion to 18 U.S.C. § 2243's definition of "minor" as someone between twelve and sixteen was not intended to suggest that sexual abuse of someone *younger* than

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F.3d 286, 294 (5th Cir. 2014) (citing *United States v. Rodriguez*, 711 F.3d 541, 560 (5th Cir. 2013) (en banc)). It did not reach the question, however, whether a certain age differential is necessary for a state-law conviction to constitute an "aggravated felony" or, if so, what that differential would be. *Id.* at 295.

twelve does not constitute "sexual abuse of a minor" under the INA. *United States v. Medina-Villa*, 567 F.3d 507, 515-16 (9th Cir. 2009); *see also Restrepo*, 617 F.3d at 799 (noting that the Ninth Circuit "retreated" from any such suggestion). But the Ninth Circuit has never wavered from its position that consensual sex with someone *older* than sixteen cannot constitute the "aggravated felony" of "sexual abuse of a minor." To the contrary, the Ninth Circuit has repeatedly confirmed that the age maximum and age differential established in *Estrada-Espinoza* are elements of the generic definition of "sexual abuse of a minor." *See, e.g.*, *United States v. Martinez*, 786 F.3d 1227, 1231 (9th Cir. 2015); *United States v. Gomez*, 757 F.3d 885, 903-04 (9th Cir. 2014); *Rivera-Cuartas v. Holder*, 605 F.3d 699, 701 (9th Cir. 2010); *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1013 (9th Cir. 2009).

The Fourth Circuit also holds that the generic definition of "sexual abuse of a minor" excludes convictions under statutes like Cal. Penal Code § 261.5(c). In *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), the Fourth Circuit interpreted the phrase "sexual abuse of a minor" in the federal sentencing guidelines, which takes its definition from the INA. *Id.* at 381. *See* U.S.S.G. § 2L1.2 cmt. N.3(A) ("For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43)."). The Fourth Circuit (per Judge Wilkinson) reasoned that conduct that is "entirely lawful" under federal law and in the majority of states cannot be an "aggravated felony." *Id.* at 381. Citing *Estrada-Espinoza* approvingly, the Fourth Circuit thus determined that while "the word 'minor' may vary depending on legal context," the age

limit for minority "is sixteen for purposes" of the "aggravated felony" of "sexual abuse of a minor." *Id.* at 380.

Finally, Tenth Circuit law dictates that a conviction under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *Id.* at 598-99. In *Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016), issued after the Sixth Circuit's decision here, the Tenth Circuit addressed whether the generic offense of "sexual abuse of a minor" has a mens rea requirement. *Id.* at 597-98. In defining the generic elements of that offense, the Tenth Circuit followed the elements in 18 U.S.C. §§ 2241 and 2243. *Id.* at 604 (citing *Estrada-Espinoza* for support). Noting that the BIA interpretation of "sexual abuse of a minor" was derived from the witness protections that 18 U.S.C. § 3509 affords to children, the Tenth Circuit held it "would not defer" to the BIA's analysis because it makes "scant sense" to rely in this context on a "procedural statute" over others that "define a substantive criminal offense." *Id.* at 598-601 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015)).

2. This conflict is ripe for review. Two terms ago, this Court denied certiorari in *Velasco-Giron*, which raised the issue presented here. *See* 135 S. Ct. 2072 (2015). The Government opposed review, noting that the BIA had just published its decision in this case and urging this Court to give the courts of appeals an opportunity to consider the effect of that decision. Brief in Opposition at 21-22, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745). It is now clear that the BIA's decision here is incapable of resolving the conflict.

a. Since the BIA issued its opinion here, the Sixth Circuit has deferred to the agency's interpretation of "sexual abuse of a minor," Pet. App. 2a, while the Tenth Circuit has rejected that interpretation as making "scant sense," *Rangel-Perez*, 816 F.3d at 601 (quoting *Mellouli*, 135 S. Ct. at 1989). Thus, the split over the meaning of 8 U.S.C. § 1101(a)(43)(A) has only deepened since the Government's request for forbearance.

b. More fundamentally, the BIA's decision itself renders the split incapable of resolution absent this Court's intervention. The BIA held that, "outside of the Ninth Circuit," convictions under state laws criminalizing sex between twenty-one-year-olds and persons almost eighteen constitute "sexual abuse of a minor." Pet. App. 35a. But inside the Ninth Circuit, the BIA itself has decided not to treat convictions like Esquivel-Quintana's as "sexual abuse of a minor." *Id.* Thus, under the BIA's own view of the law, the Ninth Circuit will not see any cases involving whether convictions under Cal. Penal Code § 261.5(c) or parallel laws constitute aggravated felonies under the INA.

Furthermore, even if the Ninth Circuit were again somehow confronted with this issue, no BIA decision could change its position. The Ninth Circuit (in its unanimous en banc decision) concluded that Section 1101(a)(43)(A) *unambiguously* excludes convictions like Esquivel-Quintana's. *Estrada-Espinoza*, 546 F.3d at 1157 n.7; *see also Velasco-Giron*, 773 F.3d at 777 (noting that the Ninth Circuit held that the BIA's position "flunks Step One of *Chevron*"). And when a court's construction "follows from the unambiguous terms of the statute," that

judicial construction "trumps" any future agency constructions to the contrary. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

II. The Question Presented Is Extremely Important, and This Case Is an Ideal Vehicle for Resolving It.

1. This Court has frequently granted certiorari to clarify the scope of generic offenses enumerated as "aggravated felonies" under the INA. *See, e.g.*, *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Here, too, resolving the conflict over the meaning of "sexual abuse of a minor" is vitally important for this country's millions of lawfully permanent residents and other noncitizens – as well as for courts, prosecutors, and criminal defense attorneys alike.

a. For lawful permanent residents such as Esquivel-Quintana, the import of whether a conviction constitutes an "aggravated felony" – thus subjecting them to "mandatory removal," *Moncrieffe*, 133 S. Ct. at 1692 – can hardly be overstated. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). It "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). These consequences are all the more serious for people – like Esquivel-

Quintana – who came here as children and now face permanent banishment from the country where they built their lives and their extended family resides.

Because the stakes are so "high and momentous," removal decisions should not depend upon "fortuitous and capricious" circumstances or subject noncitizens to "irrational" hazards. *Delgadillo*, 332 U.S. at 391. Yet the BIA and the courts of appeals here have created exactly this sort of irrational scheme: Noncitizens may suddenly become removable just by stepping across state lines. Esquivel-Quintana, for instance, was convicted of unlawful sexual intercourse in California but was not subject to removal as long as he continued to live there. Only when he moved to Michigan to be closer to his family did he become an "aggravated felon" – even though the conduct for which he was convicted is not even a crime in Michigan.

Given this crazy-quilt situation, noncitizens convicted under Cal. Penal Code § 261.5(c) and parallel state laws face serious restrictions on their freedom of mobility. They face a threat of removal if they live in, work in, or even visit thirteen states – including highly populated centers of commerce such as New York and Michigan.[3] But they are free to enter twenty other states.[4] They may reside or pass

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[3] The thirteen states are: Connecticut, Delaware, Illinois, Indiana, Kentucky, Michigan, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Vermont, and Wisconsin (in the Second, Third, Sixth, and Seventh Circuits).

[4] The twenty states are: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South

through any of the other seventeen states at their own risk, depending on what an immigration judge or court may later decide.

b. Resolving the question presented is also necessary to give guidance to courts, prosecutors, and defense attorneys with regard to prosecutions involving sex with minors.

As noted above, seven states have laws criminalizing sexual intercourse between a twenty-one-year-old and someone under eighteen: Arizona, California, Idaho, North Dakota, Oregon, Virginia, and Wisconsin. *See* Pet. App. 67a-68a (collecting state statutes). In just one year in California alone, prosecutors filed almost 3,000 cases under its law regulating this and other forms of "statutory rape." Governor's Office of Criminal Justice Planning, *Statutory Rape Vertical Prosecution: Fourth Year Report* 3 (2000).

Resolving whether convictions under these statutes constitute "aggravated felonies" under the INA would enable prosecutors to make charging and plea bargaining decisions with full knowledge of the immigration consequences. Indeed, some states impose on prosecutors explicit statutory or ethical duties to consider the immigration consequences of potential plea agreements. *See, e.g.*, Cal. Penal Code § 1016.3(b); Va. State Bar Legal Ethics, Formal Op. 1876 (2015). Prosecutors cannot do that effectively against the current backdrop of uncertainty.

Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming (in the Fourth, Ninth, and Tenth Circuits).

Defense attorneys also need clarity in this area. The categorical approach is designed partly to enable noncitizens "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotation marks omitted). And defense counsel have a duty to advise clients as to which crimes are "aggravated felonies" and which are not. *See Padilla*, 559 U.S. at 367. Yet defense lawyers cannot provide that advice when the circuits are in disarray.

c. The question presented is also salient for the criminal justice system more widely. "Aggravated felony" convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. For instance, noncitizens who illegally reenter the country may generally receive a two-year prison sentence, but noncitizens who have been convicted of "aggravated felonies" who reenter illegally may receive up to twenty years. 8 U.S.C. § 1326(b)(2); U.S. Sentencing Guidelines § 2L1.2 cmt. n.3(A) (2015). Noncitizens convicted of "aggravated felonies" are also subject to criminal sanctions if they disobey orders of removal, *see* 8 U.S.C. § 1253(a)(1), as are individuals who help "aggravated felon[s]" illegally enter the country, *id.* § 1327.

These criminal consequences arise frequently. Illegal reentry alone constitutes 26% of all federal criminal cases. U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). And approximately 7,500 federal criminal cases are brought every year against noncitizens convicted of aggravated felonies

for reentering the country. *Id.* at 8-9.[5] Courts need to know when these prosecutions are properly charged and when they are not.

2. This case is an excellent vehicle for resolving whether "sexual abuse of a minor" covers convictions such as Cal. Penal Code § 261.5(c). The question presented has been fully litigated at each stage in this proceeding. It has also yielded a precedential BIA opinion and a published Sixth Circuit opinion with a lengthy dissent. And the question presented is outcome determinative for Esquivel-Quintana.

III. The Sixth Circuit's Decision Is Incorrect.

The Sixth Circuit's holding – that Esquivel-Quintana's conviction constitutes "sexual abuse of a minor" under the INA – is incorrect. Regardless of whether *Chevron* applies, the first step in any statutory interpretation case is to determine whether the statute dictates a clear answer to the issue. Here, the generic federal definition of "sexual abuse of a minor" clearly excludes the least culpable conduct under Cal. Penal Code § 261.5(c) – consensual sex between a twenty-one-year-old and a person almost eighteen. So the Sixth Circuit's analysis should have ended there.

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[5] The Sentencing Commission has proposed an amendment to U.S. Sentencing Guidelines § 2L1.2 that would decouple the level of sentencing enhancements from the "aggravated" nature of the prior conviction. *See* 81 Fed. Reg. 27,262, 27,273 (May 5, 2016). Regardless of whether Congress approves this amendment, the definition of the term will remain critical in illegal reentry cases where the Government seeks a sentence enhancement exceeding ten years. *See* 8 U.S.C. § 1326(b)(1).

But even if the phrase "sexual abuse of a minor" were ambiguous as to whether it covers convictions under statutes like Cal. Penal Code § 261.5(c), it would not matter. This Court has never deferred to the BIA's generic definition of an "aggravated felony," and *Chevron* deference is clearly improper where, as here, an agency is interpreting a civil statute with criminal applications. Finally, even if *Chevron* deference were permissible in these circumstances, the BIA's interpretation is unreasonable and so it still would not be worthy of deference.

A. Interpretive Tools Clearly Dictate That Sex Between a Twenty-One-Year-Old and Someone Almost Eighteen Does Not Constitute "Sexual Abuse of a Minor."

A straightforward application of the categorical approach resolves this case. Under that approach, courts look to federal and state criminal laws, as well as the Model Penal Code, to determine the "generic" federal definition of the "aggravated felony" at issue. *Taylor v. United States*, 495 U.S. 575, 596-98 & n.8 (1990). According to each of these guides, as well as customary tools of statutory interpretation, the least of the acts criminalized under Cal. Penal Code § 261.5(c) is clearly not "sexual abuse of a minor."

1. Federal law, the vast majority of states, and the Model Penal Code all deem consensual sex between twenty-one-year-olds and persons under eighteen to be legal; only one state deems it "sexual abuse."

a. *Federal law.* 18 U.S.C. § 2243 contains the only definition of "sexual abuse of a minor" in the U.S. Code. That statute requires that a victim be

under sixteen years old and that the defendant be at least four years older. (A second statute, titled "aggravated sexual abuse" criminalizes sexual acts with anyone younger than twelve. *See* 18 U.S.C. § 2241(c).)

The Sixth Circuit deemed Section 2243 inappropriate as a guide for two reasons, but neither withstands scrutiny. First, the Sixth Circuit maintained that the BIA had permissibly looked to 18 U.S.C. § 3509 instead of Section 2243 to determine the meaning of "minor." Pet. App. 12a. But Section 3509 establishes "[c]hild victims' and child witnesses' rights" in court – for example, the right of child-abuse victims to testify via closed-circuit television. *See* 18 U.S.C. § 3509. It does not establish any crime or even define the word "minor." Section 2243's criminal prohibition, therefore, is the only pertinent provision of federal law here.

Second, the Sixth Circuit noted that, in contrast to other "aggravated felonies" listed in the INA that cross-reference particular federal criminal statutes, Section 1101(a)(43)(A)'s listing of "sexual abuse of a minor" does not cross-reference Section 2243. Pet. App. 14a. But the lack of a cross-reference is unremarkable. The meaning of "sexual abuse of a minor" does not derive exclusively from Section 2243. Rather, as with "murder," "rape," "burglary," "theft" and other crimes in the INA that are not defined by cross-reference, *see* 8 U.S.C.§§ 1101(a)(43)(A) & (G), "sexual abuse of a minor" is defined according to the "generic sense in which the term is now used" under federal law, state law, and the Model Penal Code, *Taylor*, 495 U.S. at 598. Section 2243 is simply the most relevant federal source for *that* inquiry.

b. *State law.* The restrictive definition of "sexual abuse of a minor" under federal criminal law is consistent with "the criminal codes of most States," *Taylor*, 495 U.S. at 598. While every state criminalizes sex between someone under sixteen and a person more than four years older, only seven states criminalize the least culpable conduct at issue here: sex between someone who is twenty-one and another who is almost eighteen. *See* Pet. App. 67a-68a (collecting state statues).

But even the number seven substantially overcounts the number of states that deem consensual sex between a twenty-one-year-old and someone under eighteen to be "sexual abuse." Within the seven states that criminalize that behavior, state law still typically reserves the label "abuse" to describe separate sex crimes where the offender holds a position of authority over the victim or the victim is younger than sixteen. Virginia, for example, considers a minor to be sexually "abused" only when his "parents" or someone else "responsible for his care" commits or facilitates the illegal sexual acts, Va. Code § 16.1-228.4, or the minor is under fifteen, *id.* 18.2-67.4:2. Arizona and North Dakota similarly limit their definition of "sexual abuse" to sexual contact with children younger than fourteen or fifteen, respectively. *See* Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1. California, Idaho and Wisconsin likewise limit their definition of "sexual abuse" to sex with someone who is under sixteen. Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)); Idaho Code § 18-1506; Wis. Stat.

948.02(2) (cross-referenced in *id.* § 971.37(1)).[6] Lest there be any doubt, California has explicitly stated that it does *not* consider a sixteen-year-old who, as here, "voluntarily engages in sexual intercourse" to be a victim of "abuse." *In re Kyle F.*, 5 Cal. Rptr. 3d 190, 194 (Ct. App. 2003); *see also Opinion No. 83-911*, 67 Ops. Cal. Atty. Gen. 235 (1984) (same).

In fact, only *one* state appears to characterize consensual sex between someone almost eighteen and a person just three years older as " sexual abuse." *See* Or. Rev. Stat. § 163.415(1)(B). Under these circumstances, the notion that the generic definition of "sexual abuse of a minor" encompasses consensual sex between someone almost eighteen and a person just three years older is hard to fathom.

c. *The Model Penal Code.* Like the U.S. Code and the vast majority of state codes, the Model Penal Code's provision criminalizing sex with persons less than a certain age requires that the victim be under sixteen and at least four years younger than the defendant. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962). The least culpable conduct at issue here is perfectly legal under the Model Penal Code – and is certainly not any form of "abuse."

2. Surrounding language in the INA reinforces that "sexual abuse of a minor" does not cover consensual sex between a twenty-one-year-old and someone just shy of eighteen.

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[6] In California, the perpetrator must also be older than twenty-one. *See* Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)).

First, it is vital to bear in mind that Congress has classified "sexual abuse of a minor" as an "aggravated felony," as opposed to a lesser transgression. This Court is "very wary" of defining "aggravated felony" in a manner that "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (internal quotation marks omitted). In *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), for example, the Court deemed it a "fundamental flaw" for the Government to argue that "even an undisputed misdemeanor [under federal law was] an aggravated felony." *Id.* at 1689.

The Sixth Circuit's position here is even more outlandish. Federal law *does not even criminalize* the least culpable conduct at issue. Nor do the vast majority of other states. And even among the seven states that criminalize the conduct, four demand it be charged as a misdemeanor.[7] Surely conduct that is *legal* in nearly all jurisdictions and a misdemeanor in most others cannot be an "aggravated felony."

Moreover, Congress's placement of the phrase "sexual abuse of a minor" alongside "murder" and "rape" underscores that it is meant to cover only grave and inhumane felonies, not the most expansive and technical restrictions on who may engage in consensual sex. Murder is so horrific that it is

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[7] *See* N.D. Cent. Code § 12.1-20-05.1; Or. Rev. Stat. § 163.415(2); Va. Code § 18.2-371(ii); Wis. Stat. § 948.09. Only Arizona and Idaho categorize the crime as a felony, *see* Ariz. Rev. Stat. § 13-1405; Idaho Code § 18-6101(2), and California allows it to be charged as a felony (as it was here) at the prosecutor's discretion, Cal. Penal Code § 261.5(c).

sometimes punishable by death. And this Court has recognized that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (citation omitted). That "sexual abuse of a minor" keeps company with these two serious offenses imbues the term with "more precise content," *United States v. Williams*, 553 U.S. 285, 294 (2008), and indicates that it is likewise meant to cover only truly abhorrent criminal conduct. Consensual sex between a twenty-one-year-old and someone barely three years younger does not rise to that level.

B. Even If the Statute Were Unclear, *Chevron* Deference Would Still Be Inappropriate Here.

Even if it were unclear whether Section 1101(a)(43)(A) covers convictions under Cal. Penal Code § 261.5(c), the Sixth Circuit's decision would still be incorrect.

1. This Court has never deferred to the BIA when using the categorical approach to formulate the generic definition of an "aggravated felony" listed in the INA. *See Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016) (determining the generic definition of aggravated felonies described in the INA without reference to *Chevron*); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (same). *Compare also* Brief for Respondent at 45-49, *Nijhawan v. Holder*, 557 U.S. 29 (2009) (urging the Court to defer to the BIA's generic definition), *with Nijhawan v. Holder*, 557 U.S. 29 (2009) (interpreting statute without giving deference).

This makes sense. The BIA has no special expertise in defining generic crimes or applying other aspects of the categorical approach. At the same time,

the categorical approach "has a long pedigree in our Nation's immigration law" – predating *Chevron* by decades. *Moncrieffe*, 133 S. Ct. at 1685. It is designed to "promote efficiency, fairness, and predictability." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). The categorical approach also accords with the "longstanding principle" – similar to the rule of lenity in the criminal context – "of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1175-76 (2012) (noting practice of "construing ambiguities in deportation statutes in the alien's favor"). Therefore, when confronted with any "ambiguity" concerning the scope of the generic definition of an "aggravated felony," courts should simply apply the categorical approach so as to "err on the side of underinclusiveness." *Moncrieffe*, 133 S. Ct. at 1687, 1693.

The Sixth Circuit resisted resolving the case in this manner, suggesting that the categorical approach applies differently in immigration cases than in criminal cases. *See* Pet. App. 6a-7a. But the Sixth Circuit was clearly mistaken. This Court has made clear time and again that the categorical approach operates the same way – and leaves it to courts independently to ascertain the generic definition of crimes – in both contexts. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 8-9 n.2); *Moncrieffe*, 133 S. Ct. at 1684.

At any rate, as Judge Sutton explained in dissent below (Pet. App. 16a-27a), *Chevron* deference is plainly off-limits here because the particular provision of the INA at issue here, 8 U.S.C.

§ 1101(a)(43)(A), dictates not only civil consequences but criminal liability as well. *See supra* at 21. When construing a statute that imposes criminal liability, the rule of lenity requires courts to interpret ambiguity in favor of defendants. *Skilling v. United States*, 561 U.S. 358, 410 (2010). Federal agencies, in other words, have no license to resolve ambiguities in "criminal laws." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). And because courts "must interpret [a] statute consistently" whether they encounter it "in a criminal or noncriminal context," the rule of lenity must apply when interpreting statutes with criminal and civil consequences. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

The Sixth Circuit nevertheless applied *Chevron* instead of the rule of lenity here because it believed *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), required it to do so. Pet. App. 9a. The Sixth Circuit was mistaken. *Babbitt* involved a "facial challenge[]" to an administrative regulation that was on the books at the time of the conduct at issue. 515 U.S. at 704 n.18. Under those circumstances, this Court held that the regulation provided the "fair warning" the rule of lenity is designed to guarantee. *Id.*

Here, Esquivel-Quintana is not raising a facial challenge to any regulation, nor was there any clear BIA agency statement at the time of the conduct at issue. Furthermore, where ambiguous civil statutes carry criminal consequences, this Court has indicated in several cases in addition to *Leocal* that lenity (not *Chevron*) applies. *See, e.g.*, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *Kasten v. Saint-Gobain*

Performance Plastic Corp., 563 U.S. 1, 16 (2011). If forced to choose between that case law and *Babbitt*, this Court should choose the former and hold the rule of lenity requires Section 1101(a)(43)(A) to be construed to exclude convictions under statutes such as Cal. Penal Code § 261.5(c).

2. Even if *Chevron* did apply, the BIA's interpretation would still not warrant deference because it is not "a reasonable construction" of the INA. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984). The BIA made three key errors in holding that Esquivel-Quintana's California conviction constitutes "sexual abuse of a minor."

First, as noted above, the BIA determined the elements of the generic crime of "sexual abuse of a minor" by looking to a witness-protection statute, 8 U.S.C. § 3509, rather than the definition of "sexual abuse of a minor" in the federal criminal code, 18 U.S.C. § 2243. *See supra* at 24-25. The categorical approach requires courts to seek guidance in comparable *criminal* laws, not procedural statutes.

Second, the BIA inverted the categorical approach in exactly the way this Court warned against in *Moncrieffe*. Under the categorical approach, a court "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (internal quotation marks omitted and alterations in original). Nevertheless, in *Moncrieffe*, the Government complained that narrowly construing the INA's reference to drug trafficking would allow some

offenders unfairly to "avoid 'aggravated felony' determinations" because many are convicted under state laws covering wide ranges of conduct, some of which is quite serious. *Id.* at 1692-93. The Court responded that the Government's "objection to that underinclusive result [was] little more than an attack on the categorical approach itself." *Id.*; *see also Mathis v. United States*, 136 S. Ct. ___ (2016) (slip op. at 1, 7) (admonishing that "[f]or more than 25 years," and "in no uncertain terms," this Court has made clear that a state crime does not satisfy the categorical approach "if its elements are broader than those of a listed generic offense").

Here, the BIA committed the same error. Instead of identifying the least of the acts criminalized under Cal. Penal Code § 261.5(c), the BIA hypothesized particularly egregious conduct that might serve as a basis for conviction under the California law: "sexual intercourse between a 16-year-old high school student and his or her school teacher." Pet. App. 35a n.4. Because it believed that *that* conduct constitutes sexual abuse of a minor, the BIA held that *all* convictions under California's statute constitute "sexual abuse of a minor." *Id.* at 35a. This reasoning turns the categorical approach on its head.

Finally, the BIA contravened the categorical approach by adopting a geographically variable definition of "sexual abuse of a minor." The categorical approach requires "*uniform*, categorical definitions to capture all offenses of a certain level of seriousness." *Taylor*, 495 U.S. at 590 (emphasis added); *see also Moncrieffe*, 133 S. Ct. at 1693 n.11 (uniformity is the categorical approach's "chief concern"). The BIA flouted this principle, holding

that "outside of the Ninth Circuit," a violation of Cal. Penal Code § 261.5(c) is "sexual abuse of a minor," while inside the Ninth Circuit it is not. Pet. App. 35a. The BIA's holding thus sews into the INA the "odd result[]" that the categorical approach expressly rejects: A state-law conviction is an aggravated felony in some areas of the country but not others. *See Taylor*, 495 U.S. at 591. This is not only inequitable but also impermissible under this Court's precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 11, 2016

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUAN ESQUIVEL-QUINTANA, *Petitioner,* v. LORETTA E. LYNCH, Attorney General, *Respondent.*	No. 15-3101

On Petition for Review from an Order of the Board of Immigration Appeals.
No. A 047 719 438.

Decided and Filed: January 15, 2016

Before: BOGGS, SUTTON, and COOK, Circuit Judges.

COUNSEL

ARGUED: Michael Carlin, LAW OFFICE OF MICHAEL CARLIN PLLC, Ann Arbor, Michigan, for Petitioner. Yedidya Cohen, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Michael Carlin, LAW OFFICE OF MICHAEL CARLIN PLLC, Ann Arbor, Michigan, for Petitioner. Yedidya Cohen, UNITED

STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. Sejal Zota, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, Boston, Massachusetts, Charles Roth, NATIONAL IMMIGRANT JUSTICE CENTER, Chicago, Illinois, Brian J. Murray, JONES DAY, Chicago, Illinois, Rajeev Muttreja, JONES DAY, New York, New York, for Amici Curiae.

BOGGS, J., delivered the opinion of the court in which COOK, J., joined, and SUTTON, J., joined in part. SUTTON, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION

BOGGS, Circuit Judge. The Immigration and Nationality Act defines "sexual abuse of a minor" as an aggravated felony. 8 U.S.C. § 1101(a)(43)(A). Aliens convicted of an aggravated felony face numerous criminal and civil consequences, including removal from the United States. *Id.* § 1227(a)(2)(A)(iii). In this case, we consider whether "sexual abuse of a minor" includes convictions under California Penal Code § 261.5(c) for unlawful sexual intercourse with a minor. Because the Board of Immigration Appeals permissibly interpreted "sexual abuse of a minor" as including convictions under section 261.5(c), we defer to the Board's interpretation and deny Esquivel-Quintana's petition.

I

Juan Esquivel-Quintana was admitted to the United States as a lawful permanent resident in 2000. In 2009, he pleaded guilty to unlawful sexual intercourse with a minor in California. The statute under which he was convicted provides that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony." Cal. Penal Code § 261.5(c). Unlawful sexual intercourse is defined as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor," and a minor is "a person under the age of 18." *Id.* § 261.5(a). So, a twenty-year-old who has sex with a seventeen-year-old or a fifteen-year-old who has sex with a twelve-year-old could be convicted under the statute.

Subsequently, Esquivel-Quintana moved to Michigan. While he was in Michigan, the Department of Homeland Security initiated removal proceedings based on 8 U.S.C. § 1227(a)(2)(A)(iii), which states that an alien can be removed if he is convicted of an aggravated felony such as "sexual abuse of a minor," *id.* § 1101(a)(43)(A). An immigration judge ruled that Esquivel-Quintana's conviction under section 261.5(c) constituted "sexual abuse of a minor" and ordered him removed to Mexico. Esquivel-Quintana appealed.

A three-member panel of the Board of Immigration Appeals ruled against Esquivel-Quintana, concluding that "sexual abuse of a minor" includes convictions under section 261.5(c). *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 477 (B.I.A. 2015). First, the Board

stated that it would determine whether convictions under section 261.5(c) categorically constitute "sexual abuse of a minor" without looking at the specific facts of the case, such as Esquivel-Quintana's age or his victim's. *Id.* at 472. The Board did so based on *Taylor v. United States*, 495 U.S. 575 (1990), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), which call for a categorical approach to assessing prior convictions in sentencing under the Armed Career Criminal Act. The Board went on to conclude that "sexual abuse of a minor" categorically encompassed convictions under section 261.5(c). The Board stated that "in the context of State statutory rape offenses, a statute that includes 16- or 17-year-olds must also contain a meaningful age differential to constitute 'sexual abuse of a minor.'" *Esquivel-Quintana*, 26 I. & N. Dec. at 475. The Board did not specify exactly what constitutes a "meaningful" age differential, but held that the age differential in California's statute – which requires an age gap of more than three years – was meaningful. Esquivel-Quintana now petitions for review of the Board's decision.

II

Chevron supplies the appropriate framework for reviewing the Board's interpretation of "sexual abuse of a minor." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board's interpretations of immigration laws. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214 (Roberts, C.J., concurring in the judgment); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009); *INS v.*

Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999); *Kellermann v. Holder*, 592 F.3d 700, 702 (6th Cir. 2010); *Singh v. Gonzales*, 451 F.3d 400, 403 (6th Cir. 2006). Several of our sister circuits have specifically applied *Chevron* in cases involving the Board's interpretation of "sexual abuse of a minor." *See Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014); *Restrepo v. Attorney Gen. of the U.S.*, 617 F.3d 787, 796 (3d Cir. 2010); *Mugalli v. Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001).

Two circuits have reached a different conclusion. *Amos v. Lynch*, 790 F.3d 512, 518-20 (4th Cir. 2015); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1156-58 (9th Cir. 2008) (en banc). But those decisions offer little guidance here. Neither *Amos* nor *Estrada-Espinoza* involved a published, precedential BIA opinion interpreting the relevant state statute. *Amos*, 790 F.3d at 518 ("However, the principles of *Chevron* deference are not applicable to the Board's decision in Amos's case because, although issued by a three-judge panel of the BIA, it was an unpublished decision that does not carry precedential weight."); *Estrada-Espinoza*, 546 F.3d at 1157 (noting that the BIA's decision was a "single-judge, unpublished, nonprecedential" decision). Here, conversely, we owe the BIA's precedential decision *Chevron* deference. *See Lockhart v. Napolitano*, 573 F.3d 251, 262 (6th Cir. 2009). Although *Amos* and *Estrada-Espinoza* could be read to suggest that courts may forego *Chevron* deference to *published* BIA precedents solely because they establish broad standards, that proposition is, as the Seventh Circuit recently noted, at odds with basic black-letter administrative law. *Velasco-Giron*, 773 F.3d at 779; *see also NLRB v. Bell Aerospace Co.*, 416

U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). There is not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

Generic-Definition Argument. Esquivel-Quintana is misguided in relying on *Taylor* for the proposition that we must ignore *Chevron* and create our own definition of "sexual abuse of a minor." *Taylor* involved the Armed Career Criminal Act, not the Immigration and Nationality Act. While it is true that both statutes attach consequences to certain prior convictions, there are important differences as well.

The generic-definition approach established in *Taylor* with respect to the crime of burglary is intimately connected with the Armed Career Criminal Act's legislative history. 495 U.S. at 581-87. The *Taylor* Court began by discussing the first version of the Armed Career Criminal Act, passed in 1984, which specifically defined "burglary" as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Id.* at 581. The Court then recounted how Congress deleted this definition, quoting extensively from committee hearing testimony and statements by members of Congress. *Id.* at 582-87. The Court concluded that "[t]he legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process," and on that basis adopted

a generic definition of burglary. *Id.* at 589-90. Given *Taylor*'s intimate connection with the Armed Career Criminal Act's legislative history, we decline to read *Taylor* as requiring us to adopt an identical approach to interpreting the phrase "sexual abuse of a minor," which was added to the Immigration and Nationality Act in 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627.

Rule of Lenity. Esquivel-Quintana argues that we should apply the rule of lenity and construe "sexual abuse of a minor" in his favor. According to the rule of lenity, when a criminal statue is ambiguous, that ambiguity must be resolved in the defendant's favor. While this case is civil in nature, Esquivel-Quintana contends that we should still apply the rule of lenity because the definition of "sexual abuse of a minor" has criminal applications.

The phrase "sexual abuse of a minor" is listed in 8 U.S.C. § 1101(a)(43)(A) as one of many crimes that constitute an aggravated felony. In addition to serving as a basis for removal, *id.* § 1227(a)(2)(A)(iii), an aggravated-felony conviction can also result in an enhanced sentence for aliens who are subsequently convicted of the crime of illegal reentry, *id.* § 1326(b)(2). The term aggravated felony is also used to define the crime of assisting certain inadmissible aliens with entering the United States illegally. *Id.* § 1327. Thus, the phrase "sexual abuse of a minor" has both civil and criminal applications.

An increasingly emergent view asserts that the rule of lenity ought to apply in civil cases involving statutes that have both civil and criminal applications.

See Whitman v. United States, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., statement respecting denial of certiorari); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring). This view is based on two principles. First, statutory terms should not have different meanings in different cases – "a statute is not a chameleon." *Carter*, 736 F.3d at 730. Second, ambiguous statutes must be construed in favor of defendants under the rule of lenity. The rule of lenity ensures that the public has adequate notice of what conduct is criminalized, and preserves the separation of powers by ensuring that legislatures, not executive officers, define crimes. Taken together, these two principles lead to the conclusion that the rule of lenity should apply in civil cases involving ambiguous statutes with criminal applications.

There are compelling reasons to apply the rule of lenity in such cases. Giving deference to agency interpretations of ambiguous laws with criminal applications would allow agencies to "create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman*, 135 S. Ct. at 353. Writing criminal laws is the legislature's prerogative, not the executive's. Furthermore, deferring to agency interpretations of criminal laws violates the principle that "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). Left unchecked, deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers.

Nonetheless, while this view is increasing in prominence, the Supreme Court has not made it the law. To the contrary, the Court has reached the opposite conclusion. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court deferred to the Secretary of the Interior's definition of the term "take" in the Endangered Species Act of 1973, even though violations of the act could be enforced by criminal penalties. 515 U.S. 687, 703-04 (1995). The Court expressly considered and rejected the rule of lenity: "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* at 704 n.18.

Since then, the Supreme Court *has* suggested that the rule of lenity should apply in such cases. In *Leocal v. Ashcroft*, the Court omitted any discussion of *Chevron* in reviewing a Board of Immigration Appeals decision interpreting 8 U.S.C. § 1101(a)(43)(F). 543 U.S. 1, 8-13 (2004). That provision states that a conviction for a "crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)" counts as an aggravated felony if it is punishable by at least one year of imprisonment. The Court held that "crime of violence" did not include the petitioner's Florida DUI conviction, and added in dicta in a footnote:

> Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute,

> and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id. at 11 n.8. Similarly, in *Kasten v. Saint-Gobain Performance Plastic Corp.*, 131 S. Ct. 1325, 1336 (2011), and *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013), the Court suggested that the rule of lenity could apply if an ambiguity existed, but had no occasion to apply it because the statute was unambiguous.

While the Court has begun to distance itself from *Babbitt*, we do not read dicta in *Leocal* and subsequent cases as overruling *Babbitt*, or requiring that we apply the rule of lenity here in Esquivel-Quintana's civil removal proceeding. As an "inferior" court, our job is to adhere faithfully to the Supreme Court's precedents. The Supreme Court has said that we must follow *Chevron* in cases involving the Board's interpretations of immigration laws. *See Scialabba*, 134 S. Ct. at 2203 (plurality opinion); *id.* at 2214 (Roberts, C.J., concurring in the judgment); *Negusie*, 555 U.S. at 516-17; *Aguirre-Aguirre*, 526 U.S. at 424-25. This is not an "extraordinary" case. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). *Chevron* applies.

III

Under *Chevron*, we employ the traditional tools of statutory interpretation and ask whether the statute is ambiguous; if it is, we defer to the agency's permissible interpretations. As some have noted, a more elegant formulation of the inquiry might simply be: Has the agency permissibly interpreted the statute? *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009); *Singh*, 451 F.3d at 403 ("We . . . defer to the BIA's reasonable interpretations of the INA." (quoting *Patel v. Gonzales*, 432 F.3d 685, 692 (6th Cir. 2005))); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597 (2009).

The Board permissibly interpreted "sexual abuse of a minor" as including violations of California Penal Code § 261.5(c). When Congress used the ambiguous words "sexual abuse of a minor," it declined to specify a particular age of majority or age differential for statutory rape. Nowhere in the statute did Congress specify the definitions of "sexual abuse" or "minor." Congress left these questions open to interpretation by the Board of Immigration Appeals. *See Contreras v. Holder*, 754 F.3d 286, 293 (5th Cir. 2014) ("Here, there is no question that Congress has not directly spoken on the definition of sexual abuse of a minor.").

Faced with this ambiguity, the Board has interpreted "sexual abuse" by referring to the definition of the term in 18 U.S.C. § 3509(a)(8). *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-96 (B.I.A. 1999). That provision defines "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist

another to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." Furthermore, the Board draws its definition of "minor" from 18 U.S.C. § 3509(a)(2), which defines a "child" as a person under eighteen. *In re V-F-D-*, 23 I. & N. Dec. 859, 862 (B.I.A. 2006). In choosing eighteen as the age of majority, the Board acknowledged the existence of a statute – 18 U.S.C. § 2243(a), titled "sexual abuse of a minor or ward" – that makes it a federal crime to have sex with a person who is less than sixteen years old, at least twelve years old, and at least four years younger than the perpetrator. *Id.* at 861-62. The Board declined to limit the meaning of "sexual abuse of a minor" to this particular definition, drawn from a different statute passed at a different time, because in its view "Congress intended to expand, rather than limit, the age at which a person is considered a minor." *Id.* at 862 n.7. The Board elaborated on its interpretation of "sexual abuse of a minor" in this case, holding that the phrase includes convictions under a state statutory-rape law that protects sixteen- and seventeen-year-old victims while also requiring a meaningful age differential between the perpetrator and the victim. *Esquivel-Quintana*, 26 I. & N. Dec. at 477.

Nothing forbids the Board's interpretation. Indeed, there are strong arguments that support it. As the Seventh Circuit has noted, multiple criminal provisions of the United States Code define a "minor" as a person under eighteen. *Velasco-Giron*, 773 F.3d at 775. For the crime of "sexual exploitation of children," "minor" is defined as any person under the age of eighteen. 18 U.S.C. §§ 2251, 2256(1). Eighteen is also the age of majority for the crime of transporting a

"minor" with intent to engage in criminal sexual activity. 18 U.S.C. § 2423(a). The Fifth Circuit has held that, as a matter of federal law under the Sentencing Guidelines, a "minor" in the phrase "sexual abuse of a minor" is a person under the age of eighteen. *United States v. Rodriguez*, 711 F.3d 541, 548 (5th Cir. 2013) (en banc). With so many sources defining the age of majority as eighteen, the Board's interpretation certainly qualifies as permissible.

Following the narrow definition of "minor" in § 2243(a) is neither compelled nor sensible. That statute applies only when the sexual-abuse victim is at least twelve years old. Victims younger than twelve are protected by a separate statute, § 2241(c), under the crime of "aggravated sexual abuse." Using § 2243(a) as the sole definer of "minor" would mean that abuse against an eleven-year-old does not constitute "sexual abuse of a minor." Furthermore, it would mean that a seventeen-year-old abusing a twelve-year-old has committed "sexual abuse of a minor," but a fifteen-year-old doing the same thing has not done so.

The age requirements of § 2243(a) were crafted with § 2241(c) in mind. Those two provisions were enacted side-by-side in the Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87 100 Stat. 3620, 3620-21, which came into effect ten years before the phrase "sexual abuse of a minor" was added to 8 U.S.C. § 1101(a)(43)(A) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. at 3009–627. We should not haphazardly import the requirements of § 2243(a) into a completely different statute.

Congress could have included a cross-reference to § 2243(a) if it wanted to incorporate that definition of statutory rape. The Immigration and Nationality Act is replete with cross-references to federal statutes defining crimes that count as aggravated felonies. *See* 8 U.S.C. § 1101(a)(43)(B), (C), (D), (E), (F), (H), (I), (J), (K)(ii)-(iii), (L), (M)(ii), (N), (O), (P). When Congress declined to cross-reference a federal statute, it did so because it wanted to sweep in a broad array of state-law convictions. *Cf.* 8 U.S.C. § 1101(a)(43) ("The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law . . . ."). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Importing word-for-word the statutory-rape requirements of § 2243(a) would be contrary to Congress's intent to allow state-law convictions to serve as grounds for removal.

The Second, Third, and Seventh Circuits all explicitly considered and rejected the argument that "sexual abuse of a minor" is limited to statutes that go no further than § 2243(a). The Second Circuit concluded that it is "unlikely in the extreme that Congress intended such a lowest common denominator result," and upheld the removal of an alien convicted under New York's statutory-rape law. *Mugalli*, 258 F.3d at 60. The Third Circuit stated that it would not "conjoin the meaning of words used in separate and distinct statutes," and upheld the removal of an alien convicted under New Jersey's "aggravated criminal

sexual contact" law. *Restrepo*, 617 F.3d at 794. The Seventh Circuit observed that the Board "must administer . . . 8 U.S.C. § 1101(a)(43)(A), not 18 U.S.C. § 2243(a)," and upheld the removal of an alien convicted under the precise California statute involved in this case. *Velasco-Giron*, 773 F.3d at 777. We join the Second, Third, and Seventh Circuits in rejecting the unwarranted adoption of § 2243(a), and hold that the Board permissibly interpreted "sexual abuse of a minor" as including convictions under California Penal Code § 261.5(c).

IV

If Congress had supplied its own definition of "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A), this case would be easy. But Congress did not. That is why the Board of Immigration Appeals chose to interpret the phrase through case-by-case adjudication. Supreme Court and Sixth Circuit precedent require us to defer to the Board's interpretation if it is permissible.

The Board permissibly interpreted "sexual abuse of a minor" as encompassing convictions under California Penal Code § 261.5(c). Nothing in the statute forbids this interpretation. Esquivel-Quintana's petition is DENIED.

CONCURRING IN PART AND DISSENTING IN PART

SUTTON, Circuit Judge, concurring in part and dissenting in part. I agree with every part of the court's opinion but one: that a sentence from a footnote in a 1995 Supreme Court opinion requires us to apply *Chevron* deference, as opposed to the rule of lenity, to an agency interpretation of an ambiguous statute that has civil *and* criminal applications. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 794 n.18 (1995).

Let me start with our many areas of agreement.

Chevron permits agencies to fill gaps in *civil* statutes that Congress has delegated authority to the agency to interpret. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the doctrine, courts presume that, when Congress leaves an ambiguity in an agency-administered statute, it intends the agency to fill the gap. *Id.* at 843-44.

But *Chevron* has no role to play in construing *criminal* statutes. In 227 years and counting, the federal courts have never presumed that, when an ambiguity arises in a criminal statute, the congressional silence signals that Congress wants an executive-branch agency to fill the gap. For all of the theories of *Chevron* that have filled the U.S. Reports and the Federal Reporter, to say nothing of the law journals, the idea that *Chevron* is a tool for construing criminal statutes has yet to make an appearance. That

is because criminal statutes "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). The doctrine does not give the Department of Justice (or for that matter any other federal agency) *implied* gap-filling authority over ambiguous criminal statutes.

Otherwise, that would leave this distasteful combination: The prosecutor would have the explicit (executive) power to enforce the criminal laws, an implied (legislative) power to fill policy gaps in ambiguous criminal statutes, and an implied (judicial) power to interpret ambiguous criminal laws. *Cf.* The Federalist No. 47, at 297-99 (James Madison) (Clinton Rossiter ed., 1961). And it would permit this aggregation of power in the one area where its division matters most: the removal of citizens from society.

There may be good reason to debate the merits of *Chevron* today. *Compare* Philip Hamburger, Is Administrative Law Unlawful? (2014), *with* Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547 (2015) (book review). But all can agree that, whatever the connection between ancient royal prerogatives and the like to modern agency law, *Chevron* has no role to play in the interpretation of criminal statutes.

The application of *Chevron* to criminal laws also would leave no room for the rule of lenity, a rule that resolves ambiguities in criminal statutes in favor of the individual and a rule of construction that Chief Justice Marshall described as "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The rule "rests on concerns about notice (the state ought to provide fair warning of what violates the criminal

laws) and separation of powers (Congress, not agencies or courts, defines crimes)." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring).

So far so good.

But what happens when the same statute has criminal *and* civil applications? May Congress sidestep these requirements by giving criminal statutes a civil application? The answer is no. The courts must give dual-application statutes just one interpretation, and the criminal application controls. Statutes are not "chameleon[s]" that mean one thing in one setting and something else in another. *Id.* at 730. Because a single law should have a single meaning, the "lowest common denominator" – including all rules applicable to the interpretation of criminal laws – governs all of its applications. *Clark v. Martinez*, 543 U.S. 371, 380 (2005). That explains why *United States v. Thompson/Center Arms Co.* applied the rule of lenity to a civil tax case that turned on language that had civil and criminal applications. 504 U.S. 505, 517-18 & n.10 (plurality opinion); *id.* at 519 (Scalia, J., concurring in the judgment). Time, time, and time again, the Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute (with the rule of lenity) prevails over the civil-law construction of it (without the rule of lenity). When a single statute has twin applications, the search for the least common denominator leads to the least liberty-infringing interpretation. *See, e.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011);

Clark, 543 U.S. at 380; *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 408–09 (2003).

The provision at issue in today's case is subject to the one-statute/one-interpretation rule because it has criminal and civil applications. The Immigration and Nationality Act makes a state or federal conviction for "sexual abuse of a minor" an "aggravated felony." 8 U.S.C. § 1101(a)(43)(A). The Act subjects aliens who have committed aggravated felonies (1) to civil consequences, most notably removal from the country, *id.* § 1227(a)(2)(A)(iii); *see also id.* § 1229b(a)(3), and (2) to criminal consequences, most notably increasing the maximum prison term for illegal reentry into the United States, *id.* § 1326(b)(2); *see also id.* § 1327.

The phrase "sexual abuse of a minor" is ambiguous as applied to the California law that Esquivel-Quintana violated. The state law prohibits sexual intercourse with anyone under eighteen, provided the perpetrator is not the victim's spouse and is more than three years older than the victim. Cal. Penal Code § 261.5(a), (c). The age requirement found in statutory-rape statutes like this one turns on the premise that those below a certain age generally cannot consent to sex. The ambiguity arises over when a "minor" can consent and when the sexual act ceases to be abusive. The minimum conduct criminalized by the California law involves seventeen-year-old victims. *Id.* § 261.5(a). Because the meaning of "sexual abuse of a minor" is a matter of federal law, the question is whether California's statutory-rape law includes these victims under a "'generic' federal definition." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

A division in the circuits over the point suggests this answer: maybe, maybe not. One court has concluded that the phrase includes statutory-rape convictions involving seventeen-year-old victims. *See, e.g.*, *Contreras v. Holder*, 754 F.3d 286, 294-96 (5th Cir. 2014). One court has said it does not. *E.g.*, *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1157 n.7, 1158–60 (9th Cir. 2008) (en banc). And at least one court isn't sure. *E.g.*, *Velasco-Giron v. Holder*, 773 F.3d 774, 776–78 (7th Cir. 2014).

The rest of the federal criminal code doesn't make things any easier. Title 18 includes a crime entitled "sexual abuse of a minor," a statutory-rape crime that requires the victim to be under *sixteen*. 18 U.S.C. § 2243(a). But it also includes protections for "child" victims of "sexual abuse" in a setting in which the legislature uses the terms "minor" and "child" interchangeably, *see id.* § 2251, and applies those protections to victims under *eighteen*, *id.* § 3509(a)(2), (8). As a matter of history, the term "minor" has always been a fluid concept. It referred to those under twenty-one at the founding. *See* 1 William Blackstone, Commentaries *463.

Adding to the ambiguity is the question of perspective – which of two ways the interpreter looks at the statute and how closely it ties the word "minor" to the term "sexual abuse." *Cf. United States v. Castleman*, 134 S. Ct. 1405, 1411-12 (2014); *id.* at 1420 (Scalia, J., concurring in part and concurring in the judgment). At one end, the word "minor" taken by itself might generally be said to refer to "[s]omeone who has not reached full legal age." Black's Law Dictionary 1147 (10th ed. 2014). The full legal age, the

"age of majority," is typically *eighteen* –at least in most instances today. *Id.* at 73. This approach led the Fifth Circuit and the Board of Immigration Appeals to conclude "sexual abuse of a minor" captures many statutory-rape crimes, with each State allowed to set an age (no higher than eighteen) below which minors generally cannot consent. *Contreras*, 754 F.3d at 294-96; *In re Esquivel-Quintana*, 26 I. & N. Dec. 469, 471 (B.I.A. 2015); *see also United States v. Rodriguez*, 711 F.3d 541, 559–62 (5th Cir. 2013) (en banc).

At the other end, a court might just as fairly focus on the reality that the word "minor" is tied to "sexual abuse" and statutory-rape laws. In that context, the word "minor" would not necessarily refer to "full legal age" but to the age at which a State no longer deems sex nonconsensual (and therefore abusive). *See* Black's Law Dictionary 1451. That age, the "age of consent," is typically *sixteen*. *Id.* at 73; *see United States v. Rangel-Castaneda*, 709 F.3d 373, 377 (4th Cir. 2013). This approach led the Ninth Circuit to decide that statutory-rape convictions amount to "sexual abuse of a minor" only if they require victims to be below the age of sixteen. *Estrada-Espinoza*, 546 F.3d at 1158. The Fourth Circuit took a similar approach when interpreting the same phrase in the Sentencing Guidelines. *Rangel-Castaneda*, 709 F.3d at 380-81.

Either reading has much to commend it, making the phrase ambiguous and making this a classic occasion for applying the rule of lenity. All clues considered, the phrase "sexual abuse of a minor" may, but may not, include convictions under California's § 261.5(c), and for that reason the rule of lenity should end the case in favor of the immigrant.

The application of *Chevron* to this ambiguity of course leads to a different result. A statute sufficiently ambiguous to invoke the rule of lenity assuredly is sufficiently ambiguous to trigger *Chevron* deference. And adjudicative decisions by the Board typically receive *Chevron* deference. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). That means, as the court explains, that the Board's decision that Esquivel-Quintana's § 261.5(c) conviction amounts to "sexual abuse of a minor" prevails under *Chevron* deference. But it also means, as the court explains, that this interpretation would not prevail under the rule of lenity, where "sexual abuse of a minor" would cover no more than those statutory-rape crimes that set the age of consent at sixteen or less.

Yet the application of *Chevron* in this setting, as the court acknowledges, "threatens a complete undermining of the Constitution's separation of powers," while the application of the rule of lenity "preserves" them by maintaining the legislature as the creator of crimes. *Supra* at 5-6. Lenity also ensures fair notice of criminal consequences, precludes the same agency from altering criminal laws back and forth over time (even over conflicting judicial interpretations, *see Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-85 (2005), and even without input from Congress), and ensures that the same "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 729, 731 (Sutton, J., concurring). Lenity also avoids several "uninvited oddities [that] arise if courts but not agencies must adhere to the rule of lenity." *Id.* at 732-33 (collecting some of them). By applying lenity in this setting, last of all, courts would

avoid *incentivizing* Congress to enact hybrid statutes that duck under lenity's imperatives, to say nothing of other imperatives in construing criminal laws.

Where I part ways with the court is over its conclusion that, even though the rule of lenity ought to control here, we must defer to the government's position under *Chevron* all the same.

The disagreement boils down to the meaning of one sentence in one footnote. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), involved a facial challenge to a regulation interpreting a provision of the Endangered Species Act that imposed both civil and criminal liability. *Id.* at 691-93. The Supreme Court decided it "owe[d] some degree of deference" to the Department of Labor's interpretation, *id.* at 703-04, and cited *Chevron* in the process. Then, in a footnote, it said that it "ha[d] never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Id.* at 704 n.18. This statement does not, as the court claims, require us to apply *Chevron*. If it did, the footnote would have (silently) overruled an entire line of cases that "hold that, if Congress wants to assign responsibility for crime definition to the executive, it must speak clearly." *Carter*, 736 F.3d at 734 (Sutton, J., concurring); *see, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 519 (1911); *see also Touby v. United States*, 500 U.S. 160, 165-67 (1991). And the footnote expressly limits itself to "facial challenges," the sorts of claims that raise arguments – say that the regulation exceeded the agency's authority and thus was

unenforceable in all of its applications – that have no connection to the rule of lenity. Today's case does not involve a facial challenge.

Whatever this footnote and its inscrutable reference to facial challenges meant then, cases since *Babbitt* have not followed the reading the court finds itself constrained to follow. In one case, the Court declined to address how the rule of lenity applied in relation to *Chevron*, hardly necessary if *Babbitt* answered the question for cases that did not involve facial challenges to regulations. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 & n.8 (2001). In another case, the Court concluded that the rule of lenity provided the rule of decision, hardly possible if the issue had been decided the other way. If a statute "has both criminal and noncriminal applications," the Court explained, the presence of ambiguity triggers the rule of lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U.S. at 11 n.8. And in a concurrence from the denial of certiorari from a securities law case, two Justices agreed that "*Babbitt*'s drive-by" footnote "deserves little weight." *Whitman v. United States*, 135 S. Ct. 352, 354 (Scalia, J., statement respecting denial of certiorari, joined by Thomas, J.).

Perhaps something else gives the court pause today – the potential sticker shock of transforming a government-always-wins canon (*Chevron*) into a government-always-loses canon (rule of lenity). But that may not be where the Court's cases necessarily lead. The Court's recent cases, as shown, just *require*

two things: that the one-statute/one-interpretation rule governs dual-role statutes, and *Chevron* does not apply to that one interpretation. Those two requirements, however, may not dictate when the rule of lenity governs and when it does not. Yes, the rule of lenity frequently may dictate that one interpretation but that need not invariably be the case. Statutory "ambiguity" may mean one thing under *Chevron* and something else under the rule of lenity. If American Inuits have more than one way to describe snow, American lawyers may have more than one way to describe ambiguity. *See* Bill Bryson, The Mother Tongue 14-15 (2001). Under *Chevron*, courts will defer to an agency interpretation if the relevant statute "is silent or ambiguous with respect to the specific issue." 467 U.S. at 843. It remains to be seen whether the same type of ambiguity triggers the rule of lenity. *See, e.g., Huddleston v. United States*, 415 U.S. 814, 831 (1974). *Chevron*'s domain and the rule of lenity's domain thus may not necessarily overlap in some cases.

What matters for present purposes is that *Chevron* has no role to play in construing hybrid statutes. Whether the rule of lenity necessarily will provide the answer in all of these cases is another matter, one for the Court ultimately to decide. In some settings, it may turn out, the Court simply will apply the normal rules of construction unaided by a zero-sum default rule, and will look to the rule of lenity only in the kinds of interpretive disputes that require it.

One last point. An exception to *Chevron* for dual-role statutes would not be the least bit unusual. Deference under that rule is categorically unavailable,

the Supreme Court has held, in many settings: (1) agency interpretations of statutes the agency is not "charged with administering," *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997); (2) agency interpretations of "the scope of the judicial power vested by [a] statute," such as the availability of a private right of action, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *see Alexander v. Sandoval*, 532 U.S. 275, 288-91 (2001); (3) agency interpretations that result from procedures that were not "in the exercise" of the agency's authority "to make rules carrying the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); (4) agency interpretations with respect to "extraordinary cases" where it is unlikely Congress "intended . . . an implicit delegation" to the agency, *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); and (5) agency interpretations of criminal statutes, *Abramski*, 134 S. Ct. at 2274. An exception for statutes with civil *and* criminal consequences fits easily alongside these exceptions and originates from the same place as the last one. Indeed, it is exceedingly difficult to understand how *Chevron* could prevail in a dual-statute case. Since the founding, it has been the job of Article III courts, not Article II executive-branch agencies, to have the final say over what criminal laws mean. I would honor that imperative here and reject the idea that Congress can end-run this principle by giving a criminal statute a civil application.

For these reasons, I concur with much of the court's reasoning but must disagree with its conclusion.

APPENDIX B

Matter of Juan ESQUIVEL-QUINTANA, Respondent

Decided January 9, 2015

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) For a statutory rape offense that may include a 16- or 17-year-old victim to be categorically "sexual abuse of a minor" under section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (2012), the statute must require a meaningful age differential between the victim and the perpetrator. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), and *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), clarified.

(2) The offense of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code, which requires that the minor victim be "more than three years younger" than the perpetrator, categorically constitutes "sexual abuse of a minor" and is therefore an aggravated felony under section 101(a)(43)(A) of the Act.

FOR RESPONDENT: Michael Carlin, Esquire, Ann Arbor, Michigan

FOR THE DEPARTMENT OF HOMELAND SECURITY: Heather A. Moilanen-Miller, Assistant Chief Counsel

BEFORE: Board Panel: PAULEY, GREER, and MALPHRUS, Board Members.

MALPHRUS, Board Member:

In a decision dated August 13, 2013, an Immigration Judge found the respondent removable as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), denied his motion to terminate the proceedings, and ordered him removed from the United States. The respondent has appealed from that decision.[1] The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Mexico who was admitted to the United States on September 15, 2000, as a lawful permanent resident. In April 2009, he was charged with two counts of unlawful intercourse with a minor more than 3 years younger than he, in violation of section 261.5(c) of the California Penal Code. On May 28, 2009, he was convicted of one count, sentenced to 90 days in jail and 5 years of probation, and prohibited from having contact with the victim. The respondent was placed in removal proceedings following his conviction. The Immigration Judge determined that his conviction was

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[1] We have requested and received helpful supplemental briefing from both parties. In its supplemental brief, the Department of Homeland Security argues that the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), does not apply in immigration proceedings. However, we addressed and dismissed similar arguments in this regard in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014).

for "sexual abuse of a minor," which is an aggravated felony under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A) (2012).

II. ISSUE

The issue on appeal is whether the offense of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code, which requires that the minor victim be "more than three years younger" than the perpetrator, categorically constitutes "sexual abuse of a minor" and is therefore an aggravated felony under section 101(a)(43)(A) of the Act.

III. ANALYSIS

Section 261.5 of the California Penal Code provides, as it did at the time of the respondent's offense, that "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor." It defines a "minor" as "a person under the age of 18 years." *Id.* Section 261.5(c) provides that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony." Thus, the elements of an offense under section 261.5(c) of the California Penal Code are (1) unlawful sexual intercourse (2) with a minor under 18 years old (3) who is more than 3 years younger than the perpetrator.

In *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995-96 (BIA 1999), we determined the ordinary meaning of "sexual abuse" by referring to the definition of that term in 18 U.S.C. § 3509(a)(8) (1994),

which we found provided useful guidance on the crimes that can reasonably be considered "sexual abuse of a minor" for purposes of section 101(a)(43)(A) of the Act. The Federal statute defined "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." 18 U.S.C. § 3509(a)(8). Our definition in *Matter of Rodriguez-Rodriguez* has been given deference by several circuit courts. *See, e.g., Restrepo v. Att'y Gen. of U.S.*, 617 F.3d 787, 795-96 (3d Cir. 2010); *Gaiskov v. Holder*, 567 F.3d 832, 835 (7th Cir. 2009); *Mugalli v. Ashcroft*, 258 F.3d 52, 57-60 (2d Cir. 2001).

Subsequently, in *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), we held that a victim of sexual abuse who is under the age of 18 is a "minor" for purposes of section 101(a)(43)(A) of the Act. *See also United States v. Rodriguez*, 711 F.3d 541, 559-60 (5th Cir. 2013) (en banc) (adopting the age of 18 as the contemporary, generic meaning of a "minor" for sentencing guidelines purposes). Thus, we have deemed any relevant offense to be "sexual abuse of a minor" if it meets the definition of "sexual abuse" in *Matter of Rodriguez-Rodriguez* and the victim is under 18 years old, as required by *Matter of V-F-D-*. In this case, we must expand upon these decisions and consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim is "sexual abuse of a minor." Such an offense is commonly referred to as "statutory rape," which is "understood to mean the unlawful sexual

intercourse with a minor under the age of consent specified by state statute." *United States v. Gomez-Mendez*, 486 F.3d 599, 603 & n.7 (9th Cir. 2007) (citing *Black's Law Dictionary* 1288 (8th ed. 2004)).

We begin with relevant context. Previously, under *Matter of Lanferman*, 25 I&N Dec. 728 (BIA 2012), and other prior Board precedent, if an offense of conviction like the respondent's potentially involved removable conduct, we would employ the modified categorical approach to determine whether the particular crime qualified as "sexual abuse of a minor." In such a case, we would have looked to judicially recognized documents in the record of conviction to determine the actual age of the victim and the age differential between the victim and the offender, as well as any other relevant facts related to the conviction. *Id.*; *see also Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990). However, following *Descamps v. United States*, 133 S. Ct. 2276 (2013), where the Supreme Court further discussed the application of the *Taylor* "modified categorical approach" and the definition of a "divisible" statute, we withdrew from *Matter of Lanferman* and announced that we would follow the law of each circuit as to divisibility. *Matter of Chairez*, 26 I&N Dec. 349, 354 (BIA 2014). Based on the Supreme Court's analysis in *Descamps* regarding the limited circumstances under which a statute is divisible and the absence of authority regarding divisibility in a statutory context relevant to this case in the United States Court of Appeals for the Sixth Circuit, we conclude that section 261.5(c) of the California Penal Code is not divisible as to the definition of sexual abuse of a minor.

Because we are therefore limited to applying the categorical approach, we may not look to any of the facts that form the basis of the conviction, including the ages of the victim and the offender. This is true even though the judicially recognized documents that were relied on to establish the conviction in the respondent's criminal proceedings are in the record and the facts are not in dispute. Accordingly, despite the inclusion of this uncontested information in the record, we may not consider the age of the victim or the actual age difference between the victim and the offender. Instead, we will look only to the minimum conduct that has a realistic probability of being prosecuted under the California statute. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).[2]

The respondent argues that in applying this categorical analysis, the Board must hold that unlawful intercourse with a minor more than 3 years younger than the perpetrator in violation of section 261.5(c) of the California Penal Code is categorically not "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. In support of his argument, he

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[2] We will further assume for these purposes that we are precluded from applying a "circumstance-specific" approach in relation to section 101(a)(43)(A) of the Act to determine the ages of the victim and the perpetrator and any age differential between them. In *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009), the Supreme Court upheld the application of the "circumstance-specific" approach to an offense that involved "fraud or deceit when the loss to the victim exceeds $10,000" under section 101(a)(43)(M)(i) of the Act but noted, albeit in dicta, that section 101(a)(43)(A) refers to the "generic crimes" of "murder, rape, or sexual abuse of a minor," which are subject only to the "categorical" approach.

relies on the Ninth Circuit's decision in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1159 (9th Cir. 2008), where the court concluded that the offense prohibited by section 261.5(c) is broader than the generic definition of "sexual abuse of a minor." According to the court, for a statute criminalizing statutory rape to define a "sexual abuse of a minor" offense, it may never include 16- or 17-year-olds as victims and it must require at least a 4-year age difference between the victim and perpetrator. *See id.* at 1152, 1158.[3] We are not bound by the Ninth Circuit's decision in these proceedings because the respondent's case arises in the Sixth Circuit, which, to our knowledge, has not opined on the definition of "sexual abuse of a minor" in this context. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989).

The Seventh Circuit has recently addressed this issue and taken a different approach from *Estrada-Espinoza*. In *Velasco-Giron v. Holder*, 768 F.3d 723 (7th Cir. 2014), the court affirmed our determination that a violation of section 261.5(c) of the California Penal Code, the same statute under which the respondent was convicted, is "sexual abuse of a minor." The court explained that Congress gave the Board, as

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[3] Additionally, the Ninth Circuit has found that a statute proscribes "abuse" if it prohibits conduct that causes "'physical or psychological harm' in light of the age of the victim in question." *United States v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009) (quoting *United States v. Baza-Martinez*, 464 F.3d 1010, 1015 (9th Cir. 2006)). However, we do not agree that sexual abuse requires any specific, identifiable harm. As discussed in *United States v. Diaz-Ibarra*, 522 F.3d 343, 350 (4th Cir. 2008), sexual abuse does not require injury because it may involve the use of a child for the gratification of an adult's sexual desires.

the administrative adjudicative authority, discretion on how to define "statutory rape of a minor" and that in making its determination that the statute prohibits "sexual abuse of a minor," the Board was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 726. It further noted that our holding in that case "flowed . . . from" the holding in *Matter of Rodriguez-Rodriguez*. *Id.* at 728 (internal quotation marks omitted).

Consistent with the Seventh Circuit's decision in *Velasco-Giron*, we hold that, outside of the Ninth Circuit, a violation of section 261.5(c) of the California Penal Code is categorically "sexual abuse of a minor." We do not agree with the Ninth Circuit that a "statutory rape" offense only qualifies as "sexual abuse of a minor" if the victim is under the age of 16. *See Rivera-Cuartas v. Holder*, 605 F.3d 699, 701-02 (9th Cir. 2010). Specifically, we are not prepared to hold that a 16- or 17-year-old categorically cannot be the victim of sexual abuse. We believe that sexual abuse of such a minor by an older person may occur in certain circumstances, and there is a realistic probability of prosecution for such abuse.[4]

"Central to the concept of 'statutory rape' is the notion that a person less than a certain age is legally incapable of giving consent and thus that statutory rape involves a sexual act committed by one partner

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[4] For example, sexual intercourse between a 16-year-old high school student and his or her school teacher is properly viewed as abusive, even if the conduct is consensual, because of the inherent coercive nature of the relationship and the potential for exploitation.

'against' the other." *Mugalli v. Ashcroft*, 258 F.3d at 58 n.6. There has been no consensus among the States on the exact age of consent for statutory rape. *See United States v. Rodriguez*, 711 F.3d at 561 n.26 (citing *United States v. Lopez-DeLeon*, 513 F.3d 472, 474 n.3 (5th Cir. 2008) (listing State statutes by the age of consent for statutory rape)). It is significant to our consideration of congressional intent, however, that a number of States defined 16- and 17-year-olds to be victims at the time Congress enacted this provision, as they continue to do. *See id.*; *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996 (defining "sexual abuse of a minor" based on common usage, which encompassed various State crimes). We do not believe that Congress intended to exclude from the aggravated felony definition all State statutes that have defined sexual abuse of a minor, in part, by the victim being 16 or 17 years old.

In this regard, courts have recognized that "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity" because "[m]inors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Gattem v. Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005); *see also Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."). The Government's argument also relies on authority stating that teenaged women "may not have the negotiation skills needed to promote self-protective behavior during sexual encounters, particularly with

older, more experienced partners." Kim S. Miller et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997).

An age differential of a few years can be very significant when a minor is involved. As the Government argues, the risk of coercion is particularly great when the victim is not in the same peer group, and having an age differential of "more than three years" helps ensure that the victim and the perpetrator are not in the same peer group. *See* Kim S. Miller, *supra*, at 214 (classifying a woman's partner as not peer-aged if he is 3 or more years older because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior).[5]

We recognize that there should be a distinction between sexual offenses involving older adolescents and those involving younger children when assessing whether consensual intercourse between peers is "abusive," and thus whether it would constitute "sexual abuse of a minor." *See United States v.*

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[5] Many courts, including the Ninth Circuit, have held that sexual offenses against children are "crimes of violence." *United States v. Medina-Villa*, 567 F.3d at 511-16; *see also, e.g., United States v. Ortiz-Delgado*, 451 F.3d 752, 757 (11th Cir. 2006); *Dos Santos v. Gonzales*, 440 F.3d 81, 84-85 (2d Cir. 2006); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993). As the Eighth Circuit has explained, there is a substantial risk of violence in the course of committing a sexual offense against a young child "given the peculiar susceptibility of minors to coercion by adults into sexual acts." *United States v. Howard*, 754 F.3d 608, 610 (8th Cir. 2014) (quoting *United States v. Daye*, 571 F.3d 225, 234 (2d Cir. 2009) (internal quotation mark omitted)).

Medina-Villa, 567 F.3d 507, 514 (9th Cir. 2009). The statute must prohibit conduct that constitutes "sexual abuse" as that term is commonly used. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996. In this regard, we do not view an offense under a statute that may involve a 16- or 17-year-old victim, and that presumes a lack of consent, as categorically constituting sexual "abuse" without requiring an age differential. *See United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009) (noting that it is difficult to classify as "abusive" certain conduct prohibited by a State statute that imposes no age differential requirement but that makes it a crime for one teenager to engage in sexual contact with another, without committing a sexual act). In our view, an age differential is the key consideration in determining whether sexual intercourse with a 16- or 17-year-old is properly viewed as categorically "abusive." *See id.* at 720-21 (differentiating between sexual acts that are "abusive," because there is a significant age differential between the perpetrator and victim, and sexual acts that are not "abusive" because they occur between high school peers who are separated in age by, for example, only 2 years).

We continue to consider the term "minor" to be a victim under 18 years old for purposes of defining "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. *Matter of V-F-D-*, 23 I&N Dec. at 862. However, we clarify that in the context of State statutory rape offenses, a statute that includes 16- or 17-year-olds must also contain a meaningful age differential to constitute "sexual abuse of a minor." At the same time, we emphasize that this holding is limited to sexual abuse statutes that may include 16-

or 17-year-olds as victims and do not make lack of consent an element of the offense. It also does not apply to other types of sexual crimes.[6]

In evaluating whether an offense is categorically one of "sexual abuse," we must carry out the congressional intent to impose immigration consequences on those who have been convicted of sexual abuse of a minor without including nonabusive consensual sexual intercourse between older adolescent peers. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996 ("Congress' intent [is] to remove aliens who are sexually abusive toward children and to bar them from any relief."). We are very limited in this regard because, in applying the categorical approach, we may not look to the actual age of the victim, the age differential between the parties, or any other facts, even if they are undisputed in the judicially recognized documents that underlie the conviction. While we do not agree that a specific age of minority is dispositive, we do believe that when a statute includes 16- or 17-year-olds and presumes a lack of consent, there must

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[6] Our holding today clarifies and refines our decision in *Matter of V-F-D-* because it applies to a conviction under a "statutory rape" statute that includes 16- and 17-year-olds as "minors." But it in no way undermines our conclusion that a "minor" is anyone under the age of 18 for purposes of determining whether sexual offenses, other than "statutory rape" including 16- and 17-year-old victims, qualify as "sexual abuse of a minor" offenses. *Cf. United States v. Gomez*, 757 F.3d 885, 903 (9th Cir. 2014) (defining "statutory rape" to require as an element that the victim be less than 16 years old). We also note that our holding in this case would not have led to a different outcome in *Matter of V-F-D-* because the Florida statute addressed there required at least a 7-year age differential between the perpetrator and the 16- or 17- year-old victim.

be a meaningful age differential for the offense to categorically constitute "abuse." *See United States v. Osborne*, 551 F.3d at 719-20.[7]

As we discussed in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 996, States "categorize and define sex crimes against children in many different ways." Therefore it is "difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements." *United States v. Rodriguez*, 711 F.3d at 556. The same is true for the subset of sex crimes referred to as "statutory rape." *See id.* at 557. Statutory rape is not a common law crime, and "[m]any jurisdictions do not use the specific label 'statutory rape' in their codes." *Id.* at 557, 559.

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[7] It is noteworthy that our application of section 261.5(c) of the California Penal Code is not limited to 16- and 17-year-old victims. If we were to conclude that the offense at issue here is not categorically "sexual abuse of a minor," sexual offenders who were prosecuted under this statute for victimizing children under the age of 16 would not be removable for having committed a "sexual abuse of a minor" aggravated felony under the Act. In other words, a conviction under this statute would never constitute a "sexual abuse of a minor" aggravated felony conviction under the Act. This is so because we cannot consider the age of the victim under the categorical approach and section 261.5(c) may involve a 16- or 17-year-old victim, but it also includes victims under the age of 16. Similarly, in the Ninth Circuit, where we are bound to apply that circuit's law, the definition of sexual abuse of a minor is based exclusively on a Federal statute that only applies to victims aged 12 to 15. *See Velasco-Giron v. Holder*, 768 F.3d at 726-27. Thus, an alien who victimizes a child under 12 years old, but who is prosecuted under section 261.5(c), is not removable in the Ninth Circuit as an alien convicted of "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. *Id.*

Most States have multiple provisions governing this type of offense and vary widely in both the extent and existence of age gaps. *United States v. Gomez*, 757 F.3d 885, 906 n.21 (9th Cir. 2014). States also differ as to strict liability versus the application of a mens rea defense. *United States v. Rodriguez*, 711 F.3d at 557. Accordingly, given the large number and variety of statutes that are potentially at issue under section 101(a)(43)(A) of the Act, even in the context of sexual offenses that presume a lack of consent, we must, as a practical matter, evaluate statutes individually and define "sexual abuse of a minor" under the Act on a case-by-case basis. *See Velasco-Giron v. Holder*, 768 F.3d at 728-29 (stating that when an agency addresses topics through adjudication, it may proceed incrementally); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).

As discussed above, for a statutory rape offense involving a 16- or 17-year-old victim to be categorically "sexual abuse of a minor" under section 101(a)(43)(A) of the Act, the statute must require a meaningful age difference between the victim and the perpetrator. Section 261.5(c) of the California Penal Code requires that the minor victim be "more than three years younger" than the perpetrator, and we conclude that this is a sufficient age differential for the offense to qualify as "sexual abuse of a minor." This standard best protects the victim while ensuring that the offense under the statute we consider in a categorical manner actually constitutes "abuse" as that term is commonly used.

IV. CONCLUSION

We conclude that the crime of unlawful intercourse with a minor in violation of section 261.5(c) of the California Penal Code categorically constitutes "sexual abuse of a minor" and is an aggravated felony under section 101(a)(43)(A) of the Act. Consequently, the respondent's California conviction under section 261.5(c) renders him removable under section 237(a)(2)(A)(iii) of the Act. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

APPENDIX C

No. 15-3101

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

FILED
Apr 12, 2016
DEBORAH S. HUNT,
Clerk

ORDER

BEFORE: BOGGS, SUTTON, and COOK, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

18 U.S.C. § 2241

§ 2241. Aggravated sexual abuse

(a) **By force or threat.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act –

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) **By other means.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly–

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby–

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children. – Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement. – In a prosecution under subsection (c) of this section, the

Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

18 U.S.C. § 2243

§ 2243 Sexual abuse of a minor or ward

(a) **Of a minor.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who –

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) **Of a ward.** – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is –

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) **Defenses.** –

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) **State of mind proof requirement.** – In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew–

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

18 U.S.C. § 3509

§ 3509. Child victims' and child witnesses' rights

(a) Definitions. – For purposes of this section –

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be –

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of

representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated–

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(b) Alternatives to live in-court testimony.–

(1) Child's live testimony by 2-way closed circuit television.–

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are—

(i) the child's attorney or guardian ad litem appointed under subsection (h);

(ii) persons necessary to operate the closed-circuit television equipment;

(iii) a judicial officer, appointed by the court; and

(iv) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child. –

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall

make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are –

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

(v) **Handling of videotape.** – The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours.

(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after

the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall become part of the court record and be kept by the court until it is destroyed.

(c) **Competency examinations.** –

(1) Effect on Federal Rules of Evidence. – Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence.

(2) Presumption. – A child is presumed to be competent.

(3) Requirement of written motion. – A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

(4) Requirement of compelling reasons. – A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

(5) Persons permitted to be present. – The only persons who may be permitted to be present at a competency examination are –

(A) the judge;

(B) the attorney for the Government;

(C) the attorney for the defendant;

(D) a court reporter; and

(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) **Not before jury.** – A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) **Direct examination of child.** – Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) **Appropriate questions.** – The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) **Psychological and psychiatric examina-tions.** – Psychological and psychiatric examin-ations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) **Privacy protection.** –

(1) Confidentiality of information. –

(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall –

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to –

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal. – All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed

under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court –

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) **Protective orders.** –

(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

(B) A protective order issued under subparagraph (A) may –

(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

(ii) provide for any other measures that may be necessary to protect the privacy of the child.

(4) **Disclosure of information.** – This subsection does not prohibit disclosure of the name of or other information concerning a child

to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

(e) Closing the courtroom. – When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the Government's specific compelling interest.

(f) Victim impact statement. – In preparing the presentence report pursuant to rule 32(c) of the Federal Rules of Criminal Procedure, the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

(g) Use of multidisciplinary child abuse teams. –

(1) In general. – A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Government shall consult with the multidisciplinary child abuse team as appropriate.

(2) Role of multidisciplinary child abuse teams. – The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including –

(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;

(B) telephone consultation services in emergencies and in other situations;

(C) medical evaluations related to abuse or neglect;

(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) **Guardian ad litem.** –

(1) **In general.** – The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) **Duties of guardian ad litem.** – A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A

guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) **Immunities.** – A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) **Adult attendant.** – A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) **Speedy trial.** – In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these

rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action. – If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids. – The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.

(m) Prohibition on reproduction of child pornography. –

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain

in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

APPENDIX E

COMPILATION OF STATE LAWS CRIMINALIZING SEX WITH PERSONS YOUNGER THAN SPECIFIED AGES

1. In thirty-two states and the District of Columbia, it is legal to have consensual sex with someone who is 16- or 17-years-old. *See* Ala. Code § 13A-6-62; Alaska Stat. §§ 11.41.436; Ark. Code § 5-14-127; Conn. Gen. Stat. §§ 53a-71; D.C. Code §§ 22-3001(3), 3008; Ga. Code § 16-6-3; Haw. Rev. Stat. § 707-730; Ind. Code § 35-42-4-9; Iowa Code § 709.4; Kan. Stat. § 21-5506; Ky. Rev. Stat. § 510.060; 17-A Me. Rev. Stat. § 254; Md. Code Crim. Law § 3-308; Mass. Gen. Laws. ch. 265, § 23; Mich. Comp. Laws § 750.520d; Minn. Stat. §§ 609.342-45; Miss. Code § 97-3-65; Mont. Code § 45-5-501, -503; Neb. Rev. Stat. § 28-319.01; Nev. Rev. Stat. § 200.366; N.H. Rev. Stat. § 632-A:3(A)(II); N.J. Stat. § 2C:14-2(c)(4); N.M. Stat. § 30-9-11; N.C. Gen. Stat. § 14-27.30; Ohio Rev. Code § 2907.04; 21 Okla. Stat. §§ 45-1111, -1112, -1114, -1116; 18 Pa. Cons. Stat. §§ 3122.1; R.I. Gen. Laws § 11-37-6 to -7; S.C. Code § 16-3-655; S.D. Codified Laws §§ 22-22-1; 13 Vt. Stat. § 3252; Wash. Rev. Code § 9A.44.079; W. Va. Code § 61-8B-5.

2. In seven other states, it is legal to have sex with a 17-year-old (but not necessarily a 16-year-old). *See* Colo. Rev. Stat. § 18-3-402 (e); 720 Ill. Comp. Stat. 5/11-1.60; La. Rev. Stat. § 14:80; Mo. Rev. Stat. § 566.034; N.Y. Penal Law § 130.05; Tex. Penal Code § 22.011; Wyo. Stat. § 6-2-316.

3. In four other states, it is legal to have sex with a 17-year-old if the older person is younger than 24 or less than four years older. *See* 11 Del. Code § 770(a)(2) (crime only if defendant is over 30); Fla.

Stat. § 794.05(1) (requiring defendant to be over 24); Tenn. Code § 39-13-506 (requiring four-year age difference); Utah Code § 76-5-401.2 (requiring seven-year age difference).

4. In the seven remaining states, it is illegal for a 21-year old to have sex with someone almost eighteen. *See* Ariz. Rev. Stat. § 13-1405; Cal. Penal Code § 261.5; Colo. Rev. Stat. § 18-3-404(1.5); Idaho Code § 18-6101(2); N.D. Cent. Code §§ 12.1-20-05.1, 14-10-01; Or. Rev. Stat. §§ 163.315 & .415; Va. Code §§ 1-207, 18.2-371; Wis. Stat. §§ 948.01 & .09.

RECORD AND BRIEFS

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No. 16-54

In the Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly concluded that petitioner's conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," in violation of California Penal Code § 261.5(c) (West 2009), was a conviction for "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

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In the Supreme Court of the United States

No. 16-54

JUAN ESQUIVEL-QUINTANA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 810 F.3d 1019. The decision of the Board of Immigration Appeals (Pet. App. 27a-41a) is reported at 26 I. & N. Dec. 469. The decision of the immigration judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2016. A petition for rehearing was denied on April 12, 2016 (Pet. App. 42a). The petition for a writ of certiorari was filed on July 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is convicted of an aggravated felony is deportable. See 8 U.S.C. 1227(a)(2)(A)(iii). In addition, an alien convicted of an

aggravated felony is not eligible for various discretionary forms of relief such as cancellation of removal. See 8 U.S.C. 1229b(a)(3). As relevant here, an aggravated felony includes "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). The INA does not further define "sexual abuse of a minor."

2. a. In 2000, petitioner, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident. Pet. App. 28a. In 2009, he was charged with two felony counts of unlawful sexual intercourse with a minor, in violation of California Penal Code § 261.5(c) (West 2009). Administrative Record (A.R.) 214-215. Section 261.5(c) makes it illegal for a person to engage in sexual intercourse with a minor if the perpetrator is more than three years older than the minor and is not the minor's spouse. California Penal Code § 261.5(c) (West 2009). A minor is defined as a person under age 18. *Id.* § 261.5(a). It is a defense that the perpetrator reasonably believed the victim was at least 18 years old. 1 B.E. Witkin & Norman L. Epstein, *California Criminal Law, Defenses*, § 53, at 488-490 (4th ed. 2012). Petitioner was 21 years old at the time of the acts charged in the complaint, and the victim was 16 years old. A.R. 214-215.

Petitioner pleaded no contest to one felony count. A.R. 209; see Pet. App. 28a. He was sentenced to 90 days in jail and five years' probation. Pet. App. 28a. He was also ordered to have no contact with the victim for three years and prohibited from "be[ing] in the presence of any minor under the age of 18 without a responsible adult present" during his five years of probation. A.R. 210.

b. In 2013, the U.S. Department of Homeland Security (DHS) served petitioner with a Notice to Appear, charging that petitioner was removable because his conviction for unlawful sexual intercourse with a minor constituted a conviction for "sexual abuse of a minor," an aggravated felony. Pet. App. 3a; A.R. 281-282; see 8 U.S.C. 1101(a)(43)(A); 8 U.S.C. 1227(a)(2)(A)(iii). An immigration judge found petitioner removable as charged. A.R. 150-158.

c. The Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal of the immigration judge's decision in a published decision clarifying the status of statutory-rape convictions under 8 U.S.C. 1101(a)(43)(A) and 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 27a-41a.

The Board explained at the outset that its prior decisions shed light on, but did not resolve, whether convictions for unlawful sexual intercourse with a minor in violation of California Penal Code § 261.5(c) (West 2009) qualified as "sexual abuse of a minor" for purposes of those INA provisions. Pet. App. 29a-30a. The Board noted that *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-996 (B.I.A. 1999) (en banc), which addressed an indecent-exposure conviction, had concluded that the definition of "sexual abuse" in 18 U.S.C. 3509(a)(8) (1994) "provided useful guidance on the crimes that can reasonably be considered 'sexual abuse of a minor' for purposes of" Section 1101(a)(43)(A). Pet. App. 30a. And it noted that *In re V-F-D-*, 23 I. & N. Dec. 859 (B.I.A. 2006), had held that "a victim of sexual abuse who is under the age of 18 is a 'minor' for purposes of" the same section. Pet. App. 30a. The Board stated that its task in petitioner's case was to "expand upon these decisions and

consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim"—a statutory-rape statute—"is 'sexual abuse of a minor.'" *Ibid.*

Using the statute-by-statute "categorical approach" set out in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), and other cases, the Board concluded that convictions for unlawful sexual intercourse with a minor in violation of California Penal Code § 261.5(c) (West 2009) qualified as convictions for "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A). Pet. App. 34a-40a. The Board explained that statutory-rape statutes reflected the understanding that "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity" because "[m]inors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Id.* at 35a (brackets in original) (quoting *Gattem* v. *Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005)). This "risk of coercion," the Board observed, "is particularly great when the victim is not in the same peer group." *Id.* at 36a; see *ibid.* (citing study that "classif[ies] a woman's partner as not peer-aged if he is 3 or more years older because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior").

The Board concluded that statutory-rape crimes that include a requirement of a significant age differential between a perpetrator and a minor victim constitute crimes involving sexual abuse of a minor, including when the statute at issue reached conduct with 16 and 17 year old victims. Victims aged 16 and

17 years old, the Board noted, were minors as that term is generally understood. Pet. App. 37a (citing *In re V-F-D-*, 23 I. & N. Dec. at 862). And the Board reasoned that so long as a statutory-rape statute reaching such minors required a meaningful age differential, it reached only conduct that "constitutes 'abuse' as that term is commonly used." *Id.* at 40a. The age-differential requirement, the Board further explained, accorded with congressional intent "to remove aliens who are sexually abusive toward children," while also ensuring that aliens were not made removable based on "nonabusive consensual intercourse between older adolescent peers." *Id.* at 38a (citation omitted). Since California Penal Code § 261.5(c) (West 2009) "requires that the minor victim be 'more than three years younger' than the perpetrator," the Board concluded that a conviction under Section 261.5(c) was a conviction for sexual abuse of a minor. Pet. App. 40a.

d. i. The court of appeals denied a petition for review. Pet. App. 1a-15a. The court first noted that *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "supplies the appropriate framework for reviewing the Board's interpretation of 'sexual abuse of a minor,'" because "[t]he Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board's interpretations of immigration laws." Pet. App. 4a.

The court of appeals rejected petitioner's arguments that it was required to "create [its] own definition of 'sexual abuse of a minor,'" rather than using the *Chevron* framework, because this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), had formulated its own definition of "burglary" in the Armed Career

Criminal Act of 1984, 18 U.S.C. 924(e). Pet. App. 6a. The court of appeals noted that "*Taylor* involved the Armed Career Criminal Act, not the Immigration and Nationality Act," as to which the Attorney General receives deference. *Ibid.* Moreover, the court noted that the definition of "burglary" adopted in *Taylor* relied heavily on legislative history that was specific to the meaning of that term in the Armed Career Criminal Act. *Id.* at 6a-7a.

The court of appeals also rejected petitioner's contention that the Attorney General was not entitled to *Chevron* deference in construing the INA provision here because the provision has civil and criminal applications. Pet. App. 7a-8a. The court noted that this Court had previously applied deference principles in interpreting a statute that could be enforced with criminal penalties, in a case in which it expressly considered and rejected the rule of lenity as an alternative method of resolving ambiguity. *Id.* at 9a (discussing *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 703-704 (1995)).

The court of appeals next concluded that the precedential Board decision in petitioner's case permissibly construed the term "sexual abuse of a minor" to include violations of California Penal Code § 261.5(c) (West 2009). Pet. App. 11a. It noted that the phrase "sexual abuse of a minor" was "ambiguous," and that Congress did not "specify the definitions of 'sexual abuse' or 'minor'" in the INA. *Ibid.* To give content to those terms, the court noted, the Board had reasonably relied on other federal statutory provisions. *Id.* at 11a-14a. In particular, the court noted, the Board had relied in part on the definition of "sexual abuse" in 18 U.S.C. 3509(a)(8) as "the employment,

use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children," *ibid.*; see Pet. App. 11a. And it had looked to the definition of a minor as a person under age 18 that is contained in 18 U.S.C. 2243(a) and other statutes. Pet. App. 11a; see *id.* at 12a-13a.

The court of appeals concluded that not only did "[n]othing forbid[]" the Board's construction of "sexual abuse of a minor" in the INA, but "strong arguments" supported that construction. Pet. App. 12a. The court noted that "minor" was commonly defined as a person under 18, including in numerous federal provisions dealing with sex crimes. *Id.* at 12a-13a (citing 18 U.S.C. 2251 and 2256(1), defining the crime of "sexual exploitation and other abuse of children"; 18 U.S.C. 2423(a), defining the crime of transporting a minor with intent to engage in criminal sexual activity; and case law addressing a U.S. Sentencing Guidelines provision concerning "sexual abuse of a minor"). "With so many sources defining the age of majority as eighteen," the court wrote, "the Board's interpretation [of minor] certainly qualifies as permissible." *Id.* at 13a.

Further, the court of appeals noted, an alternative federal provision defining "[s]exual abuse of a minor or ward" was an inappropriate guide to the meaning of the generic INA term. Pet. App. 12a-13a (discussing 18 U.S.C. 2243(a)). In the context of creating a particular federal offense, that provision defined "sexual abuse of a minor or ward" as limited to acts in which "the sexual-abuse victim is at least twelve years old." *Id.* at 13a. Using that unusual definition of "minor"

keyed to a particular federal crime to define "sexual abuse of a minor" under the INA would lead to the absurd result "that abuse against an eleven-year-old [would] not constitute 'sexual abuse of a minor.'" *Ibid.* Finding no evidence that Congress intended that unconventional definition to govern an INA provision enacted ten years later, the court wrote that it "should not haphazardly import the requirements of [Section] 2243(a) into a completely different statute." *Ibid.*

The court of appeals further noted that Congress could easily have given the term "sexual abuse of a minor" the limited meaning set forth at Section 2243(a) through use of a statutory cross-reference. Pet. App. 14a. Indeed, the INA is "replete with cross-references to federal statutes defining crimes that count as aggravated felonies." *Ibid.* The absence of a cross-reference supported the inference that Congress "wanted to sweep in a broad array of state-law convictions" for abusive sexual conduct toward minors, rather than only those convictions that matched a particular federal crime. *Ibid.*

The court of appeals noted that its decision accorded with decisions of the Second, Third, and Seventh Circuits, which had "all explicitly considered and rejected the argument that 'sexual abuse of a minor' is limited to statutes that go no further than [Section] 2243(a)." Pet. App. 14a-15a (citing *Mugalli* v. *Ashcroft*, 258 F.3d 52, 60 (2d Cir. 2001); *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 794 (3d Cir. 2010); *Velasco-Giron* v. *Holder*, 773 F.3d 774, 777 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015)). In contrast, the court wrote, the decisions that had not deferred to the Board's construction of "sexual abuse of

a minor" were inapposite, because neither decision had addressed "a published, precedential BIA opinion interpreting the relevant state statute." *Id.* at 5a (discussing *Amos* v. *Lynch*, 790 F.3d 512, 518-520 (4th Cir. 2015); *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152-1158 (9th Cir. 2008) (en banc), overruled in part on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam), and abrogated by *Descamps* v. *United States*, 133 S. Ct. 2276 (2013)).

ii. Judge Sutton concurred in part and dissented in part. Pet. App. 16a-26a. Judge Sutton agreed with the majority that the term "sexual abuse of a minor" in the INA is ambiguous, but would have applied the rule of lenity to resolve the ambiguity in favor of petitioner. *Id.* at 21a.

e. The court of appeals denied rehearing, with no judge calling for a vote regarding whether to rehear the case en banc. Pet. App. 42a.[1]

ARGUMENT

Petitioner contends (Pet. 18-22) that the court of appeals erred in accepting the Board of Immigration Appeals' classification of his conviction for unlawful sexual intercourse with a minor more than three years younger than the perpetrator, in violation of California Penal Code § 261.5(c) (West 2009), as a conviction for "sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A). The court correctly rejected petitioner's contention, and its decision does not implicate an ongoing conflict warranting this Court's intervention. Following issuance of the precedential Board decision

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[1] DHS informs this Office that petitioner was removed from the United States to Mexico on January 20, 2015.

in this case, this Court denied review of a petition for a writ of certiorari seeking review of the identical question presented, *Velasco-Giron* v. *Lynch*, 135 S. Ct. 2072 (2015) (No. 14-745), and the same result is warranted here.

1. The court of appeals correctly affirmed the Board's precedential decision construing "sexual abuse of a minor" in Section 1101(a)(43)(A) to reach convictions under California Penal Code § 261.5(c) (West 2009). The Board is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in its construction of the INA. *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws.") (plurality opinion) (citation omitted); *id.* at 2214 (Roberts, C.J., concurring in the judgment); see *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). These holdings reflect the INA's express direction that "[t]he Attorney General shall be charged with the administration and enforcement" of the INA with respect to the adjudication of removal proceedings and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (brackets in original) (quoting 8 U.S.C. 1103(a)(1) (Supp. III 1997)).

Petitioner errs in contending (Pet. 29-31)—in an argument that has not been accepted by any court—that *Chevron* deference is inapplicable to the numerous INA terms that have relevance under statutes that criminalize immigration misconduct. That argument is contrary to this Court's decisions. This Court

has applied deference principles when an agency interprets a term in a statute that it is charged with administering, even when the term has criminal relevance. *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (deferring to regulation adopted by the U.S. Securities and Exchange Commission in a criminal case); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703-704 (1995) (deferring to U.S. Secretary of the Interior's definition of the term "take," as used in the provision of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, that makes it unlawful to "take" endangered species); see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14-16 (2011) (according deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), to agencies' consistent views in briefs and manuals concerning the anti-retaliation provision in the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, although "those who violate the antiretaliation provision * * * are subject to criminal sanction").

Petitioner asserts (Pet. 30) that his contrary view of *Chevron* is supported by *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). But *Leocal* simply concluded (as the government agreed) that the Board does not receive deference concerning terms in statutes that the Board is *not* charged with administering, merely because those terms are cross-referenced in the INA. See *id.* at 11 n.8 (addressing meaning of "crime of violence" in Title 18 of the United States Code, which is cross-referenced in the INA); Gov't Br. at 33, *Leocal*, *supra* (No. 03-583). *Leocal* lacks relevance when an agency interprets terms within a statute that it is charged with administering. The other cases cited by petitioner undercut his argument. Although this Court re-

ferred to the potential applicability of the rule of lenity in *Kasten* (see Pet. 30-31), the Court did so only to reject that rule's relevance based on the fact that the agency's interpretation of the anti-retaliation provision at issue was reasonable and thus entitled to *Skidmore* deference. *Kasten*, 563 U.S. at 15-16. Nor does *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (opinion of Souter, J.), aid petitioner, as Justice Souter's plurality opinion in that case applied the rule of lenity only *after* concluding that the relevant agency rulings did not address the issue to be resolved, and thus that principles of deference were irrelevant. *Id.* at 518 n.9.

The Board's interpretation of the phrase "sexual abuse of a minor" to include statutory-rape convictions under California Penal Code § 261.5(c) (West 2009) is a reasonable one—and indeed reflects the most appropriate construction of that INA term. "Minor" generally refers to a person under the age of 18. See *In re V-F-D-*, 23 I. & N. Dec. 859, 862 (B.I.A. 2006) (citing *Black's Law Dictionary* 899 (5th ed. 1979)); see also Pet. App. 12a-13a (compiling federal laws relating to sexual offenses using that definition of "minor"). And the Board's conclusion that "sexual abuse" offenses against minors include statutory-rape offenses under laws that require a meaningful age differential accords with common usage, including with the definition that Congress used in a statute protecting minor victims of sexual abuse. See 18 U.S.C. 3509(a)(8) (defining "sexual abuse" to "include[] the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in * * * sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of

children, or incest with children"). As the Board explained, and courts have noted, the definition in Section 3509(a)(8) is consistent with ordinary understanding and appropriately aligns with Congress's intent of reaching a comprehensive set of sexual crimes against minors. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999) (en banc) (citing *Black's Law Dictionary* 1375 (6th ed. 1990)); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 58-59 (2d Cir. 2001) (noting that use of Section 3509(a)(8) was reasonable because that definition "is consonant with the generally understood broad meaning of the term 'sexual abuse' as reflected in" *Black's Law Dictionary* and was "also supported by the BIA's reading of Congressional intent to 'provide . . . a comprehensive scheme to cover crimes against children'") (citation omitted); *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 796 (3d Cir. 2010) (noting "consonance between" Section 3509(a)(8) "and the commonly accepted definition of 'sexual abuse'"). And it reflects the reality that when an older person solicits a minor not in his peer group to engage in sexual activity, that conduct presents significant risks of exploitation, coercion, and harm toward the minor victim. Pet. App. 35a-36a (citing *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (opinion of Powell, J.); *Gattem* v. *Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005); and Kim S. Miller et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997)).

Petitioner errs in suggesting (Pet. 23-24, 31) that the Board erred in relying on these sources instead of the federal offense of "[s]exual abuse of a minor or ward," 18 U.S.C. 2243(a), as the most pertinent guide

to the relevant INA term. Section 2243(a) is an inappropriate guide. To begin with, Section 2243(a) does not define a generic category meant to cover state, federal, and local offenses, but instead creates a discrete federal crime. The generic function of the term "sexual abuse" in both Section 3509(a)(8) and the INA subsection here makes the definition of "sexual abuse" with respect to minors in Section 3509(a)(8) more relevant to interpreting the INA term than the discrete federal crime in Section 2243(a).

Moreover, while Section 2243(a) treats acts of statutory rape as sexual abuse (consistent with the Board's decision here), Section 2243(a) employs a very unusual definition of "minor" that reaches only individuals age 12 to 16. As the court below (and others) have explained, using that atypical definition to set the boundaries of "sexual abuse of a minor" under the INA would yield irrational results, for it would mean that sexual abuse of an eleven year old does not constitute "sexual abuse of a minor" for purposes of the INA. Pet. App. 13a. Indeed, this "absurd result" led the sole court that initially concluded Congress intended Section 2243(a) to supply the definition of "sexual abuse of a minor" in the INA to abandon that conclusion. *United States* v. *Medina-Villa*, 567 F.3d 507, 516 (9th Cir. 2009), cert. denied, 559 U.S. 954 (2010); see *id.* at 515-516. Given the under-inclusiveness of the definition in Section 2243(a), it was reasonable for the Board to treat Section 3509(a)(8)—combined with other sources—as a more pertinent guide to Congress's understanding of the generic meaning of sexual abuse of a minor.

Petitioner alternatively suggests (Pet. 23-28) that the Board was required to define "sexual abuse of a

minor" by tallying the age ranges covered by statutory-rape provisions in state, federal, and model provisions, and then excluding convictions under statutory-rape laws in States that have the highest ages of consent for minors. But that method would be impracticable in the context of "sexual abuse of a minor" and would ill serve Congress's goals. When Congress enacted Section 1101(a)(43)(A), it sought to provide "a comprehensive scheme to cover crimes against children," against the backdrop of state sexual-abuse laws that varied widely in their details. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. There was "no consensus among the States on the exact age of consent for statutory rape," and a number of States extended their statutes to offenses against 16 and 17 year old victims (as a number of States still do). Pet. App. 35a; see *id.* at 39a (noting that States "define sex crimes against children in many different ways,'" so that "it is 'difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements'") (citation omitted). In other words, state laws were (and are) "so widely divergent that it would be difficult, if not impossible, to glean a consensus as to the common elements of those offenses." *Rangel-Perez* v. *Lynch*, 816 F.3d 591, 603 (10th Cir. 2016).

Moreover, as a result of that diversity, treating laws aimed at sexual misconduct with children as barring "sexual abuse of a minor" only when their elements reflect a majority approach would undercut Congress's objective of providing "a comprehensive scheme to cover crimes against children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996. The Board was

correct—and at a minimum, reasonable—in instead relying on a generic federal definition, common parlance, and other sources to give meaning to the term "sexual abuse of a minor" in the INA.

Petitioner next suggests (Pet. 28) that the Board's construction was impermissible because aggravated-felony categories under the INA should be interpreted "to cover only truly abhorrent criminal conduct," and, in petitioner's view, statutory-rape offenses by non-peer age perpetrators against 16 and 17 year olds do not rise to that level. But while the aggravated felony provision includes conduct such as murder and rape, see 8 U.S.C. 1101(a)(43)(A), it also includes "such comparatively minor offenses as operating an unlawful gambling business, see [Section] 1101(a)(43)(J), and possessing a firearm not identified by a serial number, see [Section] 1101(a)(43)(E)(iii)." *Torres* v. *Lynch*, 136 S. Ct. 1619, 1628 (2016). Statutory rape is, at a minimum, no less serious than these crimes. Cf. *Velasco-Giron*, 773 F.3d at 776 (stating that statutory rape as defined in Section 261.5(c) "fits comfortably next to 'rape' in [Section] 1101(a)(43)(A)").

Petitioner's final objections misunderstand the Board's decision. Petitioner contends (Pet. 31-32) that the Board erroneously failed to consider "the least of th[e] acts criminalized" under the California statute at issue here to "determine whether even those acts are encompassed by the generic federal offense." Pet. 31 (brackets in original) (quoting *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013)). Petitioner bases that conclusion (Pet. 32) on a portion of the Board's decision that used clear "example[s]" to demonstrate that "sexual abuse of a minor" can include acts perpetrated against 16 or 17 year old victims. Pet. App. 34a n.4.

But petitioner fails to acknowledge that after using examples to make that point, the Board went on to apply the categorical approach defined in *Moncrieffe* and other cases. The Board stated that it would "look only to the minimum conduct that has a realistic probability of being prosecuted under the California statute." *Id.* at 32a (citing *Moncrieffe*, 133 S. Ct. at 1684-1685). It then concluded that a statutory-rape statute covering intercourse with 16 and 17 year old victims reaches only conduct properly classified as abusive, so long as the statute requires a meaningful age differential between victim and perpetrator. *Id.* at 37a ("In our view, an age differential is the key consideration in determining whether sexual intercourse with a 16- or 17-year-old is properly viewed as categorically 'abusive'"); *id.* at 40a (concluding that the requirement of a meaningful age differential "ensur[es] that the offense under the statute we consider in a categorical manner actually constitutes 'abuse' as that term is commonly used."). The Board did not depart from the categorical approach.

Lastly, petitioner briefly suggests (Pet. 32-33) that the Board committed legal error by "adopting a geographically variable definition of 'sexual abuse of a minor.'" The Board adopted no geographically variable definition. It concluded that "the crime of unlawful intercourse with a minor in violation of [S]ection 261.5(c) of the California Penal Code *categorically constitutes* 'sexual abuse of a minor' and is an aggravated felony under [S]ection 101(a)(43)(A) of the [INA]." Pet. App. 41a (emphasis added). The Board's statement's regarding geographic scope simply recognized that the Board was "not bound by [a] Ninth Circuit[] decision" on which petitioner had

relied in a case arising in the Sixth Circuit, *id.* at 33a, even though the Board typically adheres to controlling authority in the jurisdiction where a case arises, *In re Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989).

2. As the government recently explained in opposing review of the same question that is presented here, there is no conflict that warrants this Court's intervention in light of the Board's published decision in this case. See Br. in Opp. at 15-20, *Velasco-Giron*, *supra* (No. 14-745).

a. There existed a shallow conflict before the decision below concerning the classification of statutory-rape statutes such as California Penal Code § 261.5(c) (West 2009), which turned on whether the Board's prior precedential definition of "sexual abuse of a minor" was adequately developed. The precedential decision below, however, eliminates the ground for declining deference in the Ninth Circuit—the only court to have previously declined deference to the Board's treatment of statutory-rape crimes.

Prior to the decision below, the Second, Third, and Seventh Circuits had given deference to the Board in the context of nonprecedential decisions classifying statutory-rape convictions as convictions for "sexual abuse of a minor." *Mugalli*, 258 F.3d at 60; *Restrepo*, 617 F.3d at 796; *Velasco-Giron*, 773 F.3d 774, 776-777 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015). Those courts had treated the Board's precedential decision in *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996, as providing sufficient guidance concerning the meaning of "sexual abuse of a minor" to warrant deference to the Board's applications of that decision in the context of statutory-rape offenses.

The Ninth Circuit, in contrast, had vacated an unpublished Board decision that treated a conviction under Section 261.5(c) as "sexual abuse of a minor." *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152-1158 (2008) (en banc), overruled in part on other grounds by *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam), and abrogated by *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). The Ninth Circuit initially held that deference was unwarranted to the Board's construction of "sexual abuse of a minor" on the ground that the phrase in the INA was an unambiguous reference to the narrow offense labeled "sexual abuse of a minor" in 18 U.S.C. 2243(a). *Estrada-Espinoza*, 546 F.3d at 1152-1155, 1157 n.7, 1158. But the Ninth Circuit quickly abandoned that holding, concluding that construing "sexual abuse of a minor" as limited to the offenses encompassed by that prohibition would lead to an "absurd result." *Medina-Villa*, 567 F.3d at 516; see *id.* at 515-516.

The Ninth Circuit's remaining rationale for declining to accept the Board's classification of Section 261.5(c) was that deference principles were inapplicable because the Board had not issued a precedential decision establishing that the statutory-rape offense at issue constituted "sexual abuse of a minor." *Estrada-Espinoza* emphasized that the decision before it classifying a conviction under Section 261.5(c) as "sexual abuse of a minor" was not entitled to deference because that decision—in contrast to the Board decision in this case—was non-precedential. 546 F.3d at 1156 ("*Chevron* deference does not apply to unpublished, non-precedential BIA decisions.") (citation omitted). And while the Board's precedential decision

in *Rodriguez-Rodriguez* had construed "sexual abuse of a minor" in the context of an indecent-exposure offense, the Ninth Circuit concluded that decision "ha[d]n't done anything to particularize the meaning" of the term "sexual abuse of a minor," with the result that *Chevron* deference to the decision "has no practical significance." *Id.* at 1157 (citation omitted); see also *ibid.* (describing *Rodriguez-Rodriguez* as providing nothing more than "an advisory guideline for future case-by-case interpretation").

Because the Board's issuance of a precedential decision addressing statutory-rape convictions under Section 261.5(c) eliminates that basis for withholding *Chevron* deference, there is no current conflict warranting this Court's intervention. Indeed, the court below noted as much. See Pet. App. 5a (noting that the Ninth Circuit's outlier decision in *Estrada-Espinoza* "offer[s] little guidance" in light of the Board's published decision because it did not "involve[] a published, precedential BIA opinion interpreting the relevant state statute."); see also Gov't Br. in Opp., *Velasco-Giron*, *supra*.[2]

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[2] Petitioner also claims a conflict (Pet. 15) between the decision below and *United States* v. *Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), but he is mistaken. *Rangel-Castaneda* addressed the construction of the term "sexual abuse of a minor" not in the INA but in a Sentencing Guidelines provision. *Id.* at 380-381 (considering whether a violation of a Tennessee statute qualified as "sexual abuse of a minor" for purposes of a Sentencing Guidelines provision that specified that "[c]rime[s] of violence" include "sexual abuse of a minor," Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2012)). The court of appeals accordingly construed "sexual abuse of a minor" without applying *Chevron* deference. *Rangel-Castaneda*, 709 F.3d at 380-381. The critical nature of this distinction is illustrated by the Third Circuit's decisions: While that court

b. Petitioner errs in contending (Pet. 16-18) that it is "clear that the BIA's decision here is incapable of resolving" the disagreement that previously existed. Pet. 16.

Petitioner first asserts (Pet. 16-17) that a conflict exists on the question presented even after the precedential decision below as a result of *Rangel-Perez*, *supra*. But *Rangel-Perez* did not address Section 261.5(c), age requirements under statutory-rape statutes, or any substantive aspect of the decision below. Instead, it addressed a question that no precedential Board decision has yet considered—the mens rea requirement for "sexual abuse of a minor" under Section 1101(a)(43)(A). *Rangel-Perez*, 816 F.3d at 601-606. The Tenth Circuit concluded that the generic term "sexual abuse of a minor" contains a mens rea requirement and remanded the case to the Board, expressly declining to reach any issue related to the definition of "minor" or the required age differential between victim and perpetrator. *Id.* at 606-607. *Rangel-Perez* thus lacks relevance to the question presented in this case.[3]

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concluded (under *Chevron*) that the Board permissibly defined "sexual abuse of a minor" under the INA to reach statutes that apply to sexual intercourse with 16 and 17 year olds, it also indicated it would not construe the term "sexual abuse of a minor" in the Sentencing Guidelines in that way. Compare *Restrepo*, 617 F.3d at 796 ("[T]he BIA's definition of sexual abuse of a minor is a reasonable one and * * * it is appropriate to exercise *Chevron* deference."), with *United States* v. *Ascencion-Carrera*, 413 Fed. Appx. 549, 551 n.4 (3d Cir. 2011) (suggesting violations of Section 261.5(c) would "likely not categorically qualify as sexual abuse of a minor" under the Sentencing Guidelines).

[3] Because the Utah statute at issue in *Rangel-Perez* defined "minor" as an individual under the age of 16, the victim-age issue

Unsurprisingly, under these circumstances, the interpretation that the Tenth Circuit asserted would make "scant sense" in its mens rea analysis was not the Board's holding in this case regarding victim ages. *Rangel-Perez*, 816 F.3d at 601 (citation omitted). Instead, *Rangel-Perez* stated that if the court could read the Board's earlier decision in *Rodriguez-Rodriguez* "to establish [Section] 3509(a) as the exclusive touchstone for defining all of the elements of the INA's generic 'sexual abuse of a minor' offense,"—a reading the court rejected—that wholesale importation "would make 'scant sense.'" *Ibid.* (citation omitted). The Board's decision in this case, of course, establishes that the Tenth Circuit was correct that "*Rodriguez-Rodriguez* did not establish [Section] 3509(a) as the exclusive touchstone for defining the elements of" sexual abuse of a minor, *ibid.*, because the decision below relied on multiple sources—not simply Section 3509(a)—in resolving the victim-age question, Pet. App. 34a-38a, which the Board explained had been an open one after *Rodriguez-Rodriguez*, *id.* at 30a. And while the Tenth Circuit rejected an argument that the mens rea question before it should be resolved by reference to Section 3509(a)—emphasizing that it was of "particular importance" that Section 3509(a) "does not address mens rea at all," *Rangel-Perez*, 816 F.3d at 605—the Tenth Circuit had no occasion to consider whether the Board could reasonably look to Section 3509(a), along with other sources, to answer the victim-age issue addressed below.

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addressed in the precedential decision below was not implicated in *Rangel-Perez*. See 816 F.3d at 595 (citing Utah Code Annotated § 76-5-401 (LexisNexis 2012)).

Petitioner alternatively contends (Pet. 17) that review should be granted before the Ninth Circuit has the opportunity to consider whether to defer to the precedential decision here because the BIA's decision will render it impossible for the Ninth Circuit to consider that question. That contention is incorrect. Section 1101(a)(43)(A)'s meaning (and the vitality of *Estrada-Espinoza*) are consistently put before the Ninth Circuit in cases other than appeals from the Board's aggravated-felony decisions. The decisions since the issuance of *Estrada-Espinoza* in which the Ninth Circuit has had occasion to either limit or apply that decision demonstrate as much. See, *e.g.*, *Medina-Villa*, 567 F.3d at 514-516 (limiting *Estrada-Espinoza* in Sentencing Guidelines case turning on construction of Section 1101(a)(43)(A)); see also *United States* v. *Farmer*, 627 F.3d 416, 421 (9th Cir. 2010) (clarifying *Estrada-Espinoza* in context of child-pornography prosecution), cert. denied, 564 U.S. 1040 (2011); *United States* v. *Valencia-Barragan*, 608 F.3d 1103, 1106-1107 (9th Cir.), cert. denied, 562 U.S. 1017 (2010) (applying *Estrada-Espinoza* in Sentencing Guidelines case turning on construction of Section 1101(a)(43)(A)). Accordingly, the court of appeals will have ample opportunity to consider the Board's precedential decision here regardless of whether the Board applies *Estrada-Espinoza* within the Ninth Circuit.[4] Having

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[4] The Board has not yet decided whether to apply its decision here in the Ninth Circuit. Under *In re Anselmo*, *supra*, the Board generally declines to apply its own statutory interpretation if controlling precedent in the relevant circuit rejects the interpretation in question. The decision below correctly found no basis for invoking that principle in petitioner's case, because the appellate authority that petitioner relied on—*Estrada-Espinoza*—came

denied the petition for a writ of certiorari in *Velasco-Giron*, in which the government urged that the Ninth Circuit be afforded the opportunity to consider the precedential decision below, there is no reason to now grant certiorari before that court of appeals has had the opportunity to do so.

c. The National Association of Criminal Defense Lawyers alternatively urges that this Court should grant review to address the applicability of deference principles to INA terms that have criminal applications. This Court's intervention to address that subject is also unwarranted. There is no conflict among courts of appeals concerning that question.[5] And this case would be a poor vehicle in which to consider it.

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from outside petitioner's circuit. Pet. App. 33a-34a. The Board did not have occasion to decide in petitioner's case whether the Board should adhere to *Estrada-Espinoza* within the Ninth Circuit. But the Board could well decide, when a case within the Ninth Circuit comes before it, that its precedential decision in this case should also apply there, in light of the deference principles set out in *National Cable Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). The Board has applied *Brand X* in that manner in prior cases. See, *e.g.*, *In re Douglas*, 26 I. & N. Dec. 197 (B.I.A. 2013).

[5] Courts of appeals have uniformly afforded the Board deference when construing terms within the INA that have civil and criminal applications. *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 4 (1st Cir. 2013); *Mugalli*, 258 F.3d at 56; *Restrepo*, 617 F.3d at 795-796; *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 169 (4th Cir. 2015), cert. denied, 136 S. Ct. 2386 (2016); *Alwan* v. *Ashcroft*, 388 F.3d 507, 513-515 (5th Cir. 2004); *Velasco-Giron*, 773 F.3d at 776; *Spacek* v. *Holder*, 688 F.3d 536, 538 (8th Cir. 2012); *Renteria-Morales* v. *Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008); *Balogun*

Because courts of appeals uniformly hold *Chevron* deference applicable to the Board's interpretation of the INA provisions that have criminal relevance, the question whether *Chevron* deference is warranted in such contexts comes before this Court regularly—including in cases in which there is a bona fide conflict regarding an INA provision that itself requires this Court's intervention. Indeed, the applicability of *Chevron* deference has been briefed and argued on the merits in the context of such conflicts twice in the past eight years, including last Term. Pet. Br. at 36-47, *Torres*, *supra* (No. 14-1096); Gov't Br. at 45-52, *Torres*, *supra* (No. 14-1096); Pet. Br. at 48-55, *Nijhawan* v. *Holder*, 557 U.S. 29 (2009) (No. 08-495); Gov't Br. at 45-50, *Nijhawan*, *supra* (No. 08-495). Accordingly, a statutory-interpretation case that does not otherwise require this Court's intervention is a poor vehicle for addressing the applicability of deference principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v. *U.S. Attorney Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006).

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IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

The Government has adopted a position that defies reason. The categorical approach requires courts to define generic "aggravated felonies" by surveying federal and state criminal statutes and the Model Penal Code. Yet according to the Government, conduct that is *not even criminal* under federal law, the Model Penal Code, the laws of forty-three states, or District of Columbia law—and that is characterized as "abuse" in *only one state*—falls within the generic definition of "sexual abuse of a minor."

Judges Wilkinson, Posner, and Sutton and Chief Judge Sidney Thomas have all rejected this argument—either alone or for panels of the Fourth and Ninth and Circuits. The Tenth Circuit has also rejected the argument's essential premise: that civil law sometimes treating people under eighteen as "children" trumps the specific criminal laws deeming people victims of "sexual abuse of a minor" only when under sixteen and at least four years younger than perpetrators. But four other circuits have accepted the Government's position.

The Government now tries to blur the split of authority and defend the Sixth Circuit's adoption of its misguided theory. But neither effort is convincing. This Court should grant certiorari.

I. The Conflict over the Question Presented Is Real and Ripe for Review.

The Government's attempts to minimize the circuit split are unsuccessful.

1. The Ninth Circuit held in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc),

that convictions under Cal. Penal Code § 261.5(c) do not constitute the aggravated felony of "sexual abuse of a minor." And the Government does not dispute that *Estrada-Espinoza* concluded that the Board of Immigration Appeals' (BIA's) views on the issue were irrelevant because "Congress has spoken directly to the issue," *id.* at 1157 n.7. The Government nevertheless suggests that certiorari should be postponed because the BIA's decision here might cause the Ninth Circuit to reconsider its unanimous en banc holding in *Estrada-Espinoza*. This argument ignores the real-world consequences of allowing the conflict here to persist, *see* Pet. 18-22, and strains credulity even on its own terms.

The Ninth Circuit will not see a future immigration case presenting the question presented here. The BIA's "precedential decision" below, BIO 20, applies only "outside of the Ninth Circuit." Pet. App. 34a. And the Government expresses no plans to try to initiate any future removal proceedings in the teeth of that restriction and *Estrada-Espinoza* itself.

The Government suggests the Ninth Circuit might "consider whether to defer to the [BIA's] precedential decision here" in a future *criminal* case, where the Sentencing Guidelines "turn[] on [a] construction of Section 1101(a)(43)(A)," BIO 23. Yet as the Government highlights only three pages earlier, the BIA's views are not accorded deference in the context of applying "a Sentencing Guidelines provision." BIO 20 n.2. So the Ninth Circuit will unquestionably adhere to *Estrada-Espinoza* in all future criminal cases, regardless of the BIA's views. The conflict is truly cemented.

Even if the Ninth Circuit did encounter an opportunity to reconsider *Estrada-Espinoza* in light of the BIA's decision here, it would not matter. The Government says the Ninth Circuit might reconsider *Estrada-Espinoza* because that decision relied on 18 U.S.C. § 2243—the federal statute criminalizing "sexual abuse" of victims aged twelve through fifteen—and the Ninth Circuit later clarified that Section 2243 does not "provide[] the only relevant definition" for deducing the elements of the aggravated felony of "sexual abuse of a minor." *United States v. Medina-Villa*, 567 F.3d 507, 516 (9th Cir. 2009). Other statutes, the Ninth Circuit later explained, dictate that abusing children under twelve also falls within 8 U.S.C. § 1101(a)(43)(A). *See Medina-Villa*, 567 F.3d at 515-16.

But as petitioner has explained, the Ninth Circuit has expressly reaffirmed the *Chevron* step-one holding in *Estrada-Espinoza* that convictions under statutes criminalizing sex with people *older* than sixteen do not constitute "sexual abuse of a minor" under the INA. Pet. 14-15; *see also Medina-Villa*, 567 F.3d at 515 (*Estrada-Espinoza* continues to govern "statutory rape crimes"); *United States v. Gomez*, 757 F.3d 885, 903-04 (9th Cir. 2014) (same). And justifiably so: Section 2243 explicitly requires a victim "not [have] attained the age of 16 years" (and to be "at least four years younger" than the perpetrator). 18 U.S.C. § 2243. At any rate, the other relevant touchstones under the categorical approach for defining generic crimes are "the vast majority of states" and "[t]he Model Penal Code"; those sources are "in accord" with Section 2243. *Estrada-Espinoza*, 546 F.3d at 1153, 1155; *see also id.* at 1152 n.2.

2. The Government cannot deny that the Fourth Circuit held in *United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013), that convictions under state statutes criminalizing sex with persons over sixteen do not meet Section 1101(a)(43)(A)'s definition of "sexual abuse of a minor." But because *Rangel-Castaneda* construed Section 1101(a)(43)(A) for purposes of applying the Sentencing Guidelines, where *Chevron* is indisputably inapplicable, the Government treats the case as irrelevant. BIO 20 n.2.

The Government is mistaken. The Fourth Circuit held in *Rangel-Castaneda* that it "*must* accept th[e] broad consensus" of criminal statutes limiting "sexual abuse of a minor" to sex with someone under sixteen because "the gap between an age of consent of sixteen versus eighteen is simply too consequential to disregard, and the majority of states adopting the former age is too extensive to reject." 709 F.3d at 379; *see also id.* at 380-81. That reasoning does not bespeak a court that would find an agency determination to the contrary reasonable, even if it believed deference might otherwise be permissible.

3. Finally, the Tenth Circuit has held that even if *Chevron* applied in this context, it "would not defer" to the BIA's determination that 18 U.S.C. § 3509 dictates "the elements of the INA's generic 'sexual abuse of a minor' offense." *Rangel-Perez v. Lynch*, 816 F.3d 591, 601 (10th Cir. 2016). The Government argues this holding would not compel the Tenth Circuit to reject the BIA's view in this case because here the BIA "relied on multiple sources—not simply Section 3509(a)—in resolving the victim-age question." BIO 22. Again, the Government's contention falls flat.

The Tenth Circuit rejected the BIA's approach to construing Section 1101(a)(43)(A) because it was "unreasonable" for the BIA to rely on civil law instead of "substantive criminal statutes." *Rangel-Perez*, 816 F.3d at 605-06; *see also Ibarra v. Holder*, 736 F.3d 903, 911-18 (10th Cir. 2013) (rejecting BIA's definition of "child abuse" because it relied "primarily on definitions . . . from civil, not criminal law"). The sources besides Section 3509 on which the BIA relied here—an article from a family planning journal and a few civil cases generally observing that minors have a less-developed sense of judgment than adults, Pet. App. 35a-36a—do nothing to address the Tenth Circuit's reasoning. Accordingly, there is no doubt petitioner would have prevailed in the Tenth Circuit.

II. The Sixth Circuit's Decision Is Incorrect.

Regardless of whether *Chevron* applies, the first step in any statutory interpretation dispute is whether the statute dictates a clear answer to the issue. That first step—which here involves applying the categorical approach and other tools of construction to Section 1101(a)(43)(A)—resolves this case. But even if the statute were ambiguous, the Sixth Circuit's holding that the generic definition of "sexual abuse of a minor" covers consensual sex between a twenty-one-year-old and someone almost eighteen would still be incorrect.

1. The Government does not dispute that "the least of th[e] acts criminalized," *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (alteration in original) (internal quotation mark and citation omitted), under Cal. Penal Code § 261.5(c)—consensual sex between a twenty-one-year-old and someone almost eighteen—is entirely legal under federal law, the Model Penal

Code, and the laws of forty-three states and the District of Columbia. *See* Pet. 23-26. Nor does the Government deny that only one of the seven states that criminalizes that conduct deems it "sexual abuse." *See id.* 25-26. But the Government still insists for various reasons that the generic crime of "sexual abuse of a minor" includes consensual sex between a twenty-one-year-old and someone almost eighteen. The Government is mistaken.

a. The Government initially contends that statutes criminalizing sexual relations with minors are less instructive here than the federal statute regulating the testimony of abused children, 18 U.S.C. § 3509, a handful of civil law sources, and a journal article discussing risk factors for contracting the HIV virus. BIO 12-13. Not so. Generic definitions of crimes under the categorical approach turn on typical usage "in the *criminal* codes" of the states, the federal government, and the model rules. *Taylor v. United States*, 495 U.S. 575, 598 & n.8 (1990) (emphasis added); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007) (surveying a "comprehensive account of the [criminal] law of all States and federal jurisdictions"). They do not turn on civil law, much less family planning journals.

b. The Government suggests a "tallying" of criminal codes cannot provide definitive guidance when there is "no consensus among the States" regarding the exact elements of an offense. BIO 15 (quoting Pet. App. 35a). The Government again makes a basic error. The whole purpose of the categorical approach is to derive a "uniform definition" when jurisdictions define a designated crime "in many different ways." *Taylor*, 495 U.S. at

580, 592; *see also Moncrieffe*, 133 S. Ct. at 1684. Courts, therefore, may not simply throw up their hands where state laws "var[y] widely in their details," BIO 15. That is precisely when a court must determine how the designated offense is defined "in the criminal codes of *most* States." *Taylor*, 495 U.S. at 598 (emphasis added); *see also United States v. De Jesus Ventura*, 565 F.3d 870, 876 (D.C. Cir. 2009) ("*Taylor* instructs us to determine the elements of kidnapping that are common to most states' definitions of that crime."); *United States v. Palomino Garcia*, 606 F.3d 1317, 1331-34 (11th Cir. 2010) (same). And where, as here, states (as well as the federal government and the Model Penal Code) overwhelmingly agree regarding particular elements, that agreement controls. *Taylor*, 495 U.S. at 598.

c. The Government next tries to marginalize the federal statute criminalizing "sexual abuse of a minor," 18 U.S.C. § 2243, as "very unusual" because it proscribes sex with minors only from ages "12 to 16." BIO 14. But there is nothing unusual about dictating that consensual sex with someone *over* sixteen is legal; that determination comports with the law in most states. Pet. App. 66a. Nor is it odd to leave it to a separate statute (18 U.S.C. § 2241) to criminalize sex with young children as a more serious offense. A great many state laws do that as well.[1]

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[1] *See, e.g.*, Ala. Code § 13A-6-62(a)(1) (12- to 15-year-olds) & *id.* § 13A-6-61(a)(3) (less than 12-year-olds); Alaska Stat. § 11.41.436(a)(1) (13- to 15-year-olds) & *id.* § 11.41.434(a)(1) (less than 13-year-olds); Conn. Gen. Stat. § 53a-71(a)(1) (13- to 15-year-olds) & *id.* § 53a-70(a)(2) (less than 13-year-olds); Ind. Code § 35-42-4-9(a) (14- and 15-year-olds) & *id.* § 35-42-4-3(a)

The Government is thus incorrect that taking guidance from Section 2243 "would mean that sexual abuse of an eleven year old does not constitute 'sexual abuse of a minor' for purposes of the INA." BIO 14. Section 2243 helps determine the *maximum* age for triggering the generic crime, while Section 2241 and its state counterparts make clear that there is no *minimum* age for committing "sexual abuse of a minor." *See* Pet. 23-24.

(less than 14-year-olds); Kan. Stat. § 21-5506(b)(1) (14- and 15-year-olds) & *id.* § 21-5503(a)(3) (less than 14-year-olds); La. Stat. § 14:80(A)(1) (13- to 16-year-olds) & *id.* § 14:42(A)(4) (less than 13-year-olds); Me. Rev. Stat. tit. 17-A, § 254(1)(A) (14- and 15-year-olds) & *id.* § 253(1)(B) (less than 14-year-olds); Mich. Comp. Laws § 750.520d(1)(a) (13- to 15-year-olds) & *id.* § 750.520b(1)(a) (less than 13-year-olds); Nev. Rev. Stat. §§ 200.364(6), 368 (14- and 15-year-olds) & *id.* § 200.366(1)(b) (less than 14-year-olds); N.M. Stat. § 30-9-11(G)(1) (13- to 16-year-olds) & *id.* § 30-9-11(D) (less than 13-year-olds); N.D. Cent. Code § 12.1-20-05(1) (15- to 17-year-olds) & *id.* § 12.1-20-03(1)(d) (less than 15-year-olds); Ohio Rev. Code § 2907.04(A) (13- to 15-year-olds) & *id.* § 2907.02(A)(1)(b) (less than 13-year-olds); 11 R.I. Gen. Laws § 11-37-6 (15-year-olds) & *id.* § 11-37-8.1 (less than 15-year-olds); S.C. Code § 16-3-655(B)(1) (11- to 14-year-olds) & *id.* § 16-3-655(A)(1) (less than 11-year-olds); Tenn. Code § 39-13-506(b)(2) (15- to 17-year-olds), *id.* § 39-13-506(b)(1) (13- and 14-year-olds) & *id.* § 39-13-504(a)(4) (less than 13-year-olds); Utah Code § 76-5-401.2 (16- and 17-year-olds), *id.* § 76-5-401.1 (14- and 15-year-olds) & *id.* § 76-5-402.1(1) (less than 14-year-olds); Va. Code § 18.2-371 (15- to 17-year-olds), *id.* § 18.2-63(A) (13- and 14-year-olds) & *id.* § 18.2-61(A)(iii) (less than 13-year-olds); Wash. Rev. Code § 9A.44.079(1) (14- and 15-year-olds), *id.* § 9A.44.076(1) (12- and 13-year-olds) & *id.* § 9A.44.073(1) (less than 12-year-olds); Wyo. Stat. § 6-2-315(a)(i) (13- to 15-year-olds) & *id.* § 6-2-314(a)(i) (less than 13-year-olds).

2. Even if Section 1101(a)(43)(A) left ambiguity regarding what constitutes the aggravated felony of "sexual abuse of a minor," the Sixth Circuit's holding would still be incorrect. The Sixth Circuit was wrong to apply *Chevron* deference, and the BIA's analysis would fail the reasonableness test in any event.

a. Petitioner argues *Chevron* does not apply here for two reasons: (i) the categorical approach itself requires courts to resolve "ambiguit[ies]" by "err[ing] on the side of underinclusiveness," *Moncrieffe*, 133 S. Ct. 1693; *see also Taylor*, 495 U.S. at 590-602; and (ii) ambiguities in immigration statutes that also define criminal sanctions must be resolved against the Government. Pet. 28-31. The Government does not defend the Sixth Circuit's rejection of the first argument. This alone provides reason to grant certiorari and rule in petitioner's favor.

The Government's response to the second argument makes granting certiorari all the more essential. According to the Government, ambiguous provisions in the INA's list of aggravated felonies may be resolved *in favor of* the Government when invoked in immigration cases even though they must be resolved *against* the Government when invoked in criminal cases. BIO 10-11, 20 n.2. That is a remarkable proposition.

It also flouts this Court's precedent. Shortly after the rise of the administrative state, this Court held: "There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [a statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. 284, 296 (1954).

Modern decisions concur. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context."); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion) (same).

The Government tries to distinguish *Leocal* and *Thompson/Center* on their facts. BIO 11-12. The legal principle those cases espouse, however, should be unimpeachable. As Judge Sutton explained below, "[s]tatutes are not 'chameleon[s]' that mean one thing in one setting and something else in another." Pet. App. 18a (second alteration in original) (quotation marks and citation omitted); *see also* NACDL Br. 9-14. And that principle applies with full force here.

Finally, the Government protests that no lower court has held that the INA's "aggravated felony" provisions must mean the same thing in immigration proceedings as in criminal cases. BIO 10. But the Ninth Circuit follows this rule respecting the very provision at issue here. *See also Medina-Villa*, 567 F.3d at 512 ("[W]e must interpret [Section 1101(a)(43)(A)] consistently, whether we encounter its application in a criminal or noncriminal context." (quoting *Leocal*, 543 U.S. at 12 n.8)). The Fifth Circuit likewise rejects the notion that classifying a conviction under the INA "depends upon whether 'aggravated felony' is being applied in sentencing or in the immigration context." *United States v. Hernandez-Avalos*, 251 F.3d 505, 509-10 & 509 n.2 (5th Cir. 2001), *overruled on other grounds by Lopez v. Gonzales*, 549 U.S. 47 (2006). So not only this Court's precedent, but also lower court case law, supports review here.

b. In any event, the BIA's interpretation of Section 1101(a)(43)(A) is unreasonable. The BIA improperly construed the phrase "sexual abuse of a minor" by reference to civil instead of criminal law, *see supra* at 6-8, and made two other errors.

First, citing the example of a sixteen-year-old having sex with "his or her school teacher," the BIA deemed convictions under Cal. Penal Code § 261.5(c) to constitute "sexual abuse of a minor" because it was "not prepared to hold that a 16- or 17-year-old *categorically cannot* be the victim of sexual abuse." Pet. App. 34a & n.4 (emphasis added). This turns the categorical approach upside down. A state-law conviction is an "aggravated felony" under the INA only if *every* violation of the state law falls within the generic definition of the crime, not if *any conceivable* violation might. *See* Pet. 31-32.

The Government notes that the BIA elsewhere recited the rule that adjudicators applying the categorical approach should "look only to the minimum conduct" criminalized under the state law. BIO 17 (quoting Pet. App. 32a). But the Government fails to come to grips with the fact that the BIA did not follow that rule.

Second, the BIA concluded that convictions under Cal. Penal Code § 261.5(c) and parallel state laws subject noncitizens to automatic removal in some areas of the country but not within others—specifically, "the Ninth Circuit." Pet. App. 34a. The Government responds that this geographical variance owes simply to the Board's practice of "adher[ing] to controlling authority in the jurisdiction where a case arises." BIO 17-18 (citing *In re Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989)). Be that as it may, it

remains that the BIA's decision makes deportability turn on where in the country a noncitizen resides. That thwarts the categorical approach's vital goal of uniformity and calls out for this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States representing attorneys practicing in the field of criminal defense—including private criminal-defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL files numerous *amicus curiae* briefs each year in this Court and other courts. This Court has often cited NACDL *amicus curiae* briefs that address the everyday workings of the criminal-justice system and the implications of the Court's decisions in criminal justice and immigration cases.

NACDL and its members have an important professional interest in two of the issues raised in the petition for a writ of certiorari filed in this case. First, NACDL has a longstanding interest in the question of whether the rule of lenity applies when a court confronts an ambiguous statutory provision that has both civil and criminal applications and that an administrative agency has interpreted. NACDL filed an amicus brief in this Court on that subject last Term in *Luna*

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of amicus curiae's intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Torres v. Lynch, No. 14-1096. Second, NACDL and its members also have an interest in the correct application of the "categorical approach" of *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny. NACDL has filed amicus briefs in numerous cases in this Court implicating the categorical approach.

Given NACDL's expertise in these matters, NACDL respectfully believes its perspective would be helpful to the Court in evaluating the importance of this case and determining whether to grant certiorari.

INTRODUCTION

This case concerns the meaning of the statutory term "sexual abuse of a minor," an "aggravated felony" listed in the Immigration and Nationality Act (INA). 8 U.S.C. § 1101(a)(43)(A) (defining "aggravated felony" to include "murder, rape, or sexual abuse of a minor"). As explained in the Petition for a Writ of Certiorari, the Sixth Circuit deepened an existing circuit split when it held that the petitioner's conviction under California Penal Code section 261.5(c)—which criminalizes consensual sexual conduct that is not even criminal in 43 states and is punishable as a felony in just three—ranked as an "aggravated felony." A grant of certiorari is warranted for all of the reasons laid out in the Petition. *Amicus* respectfully submits this brief to highlight two additional considerations that support a grant of certiorari.

First, certiorari is warranted to address an important and fundamental question of statutory interpretation and constitutional law: when a court confronts an ambiguous federal statutory provision that

has both civil and criminal applications and that an administrative agency has interpreted, does the rule of lenity apply, or is the agency's interpretation instead eligible for deference under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)? Here, the Sixth Circuit declined to apply the rule of lenity and instead afforded *Chevron* deference to the Board of Immigration Appeals' (BIA's) interpretation of section 1101(a)(43).

That statutory provision, however, has extensive criminal applications in addition to its role in civil immigration law. This Court has held that criminal statutes must be interpreted according to the "rule of lenity," which resolves ambiguities in the defendant's favor, narrowing the potential punitive reach of the statute. *United States v. Santos*, 553 U.S. 507, 514 (2008). The Court has also held that statutory provisions with both civil and criminal applications (referred to here as "hybrid" statutes) must carry a single, unitary meaning in both the civil and criminal context. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Put together, these two principles compel the conclusion that the rule of lenity must be applied to "hybrid" statutes even in civil cases, and the Court's opinions recognize as much. See *id.*; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *FCC v. ABC*, 347 U.S. 284, 296 (1954). Yet here, the Sixth Circuit—while recognizing that this rationale is "compelling," Pet. App. 8a—believed that a footnote in this Court's opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), obligated it to afford *Chevron* deference to the BIA's interpreta-

tion of section 1101(a)(43), notwithstanding that provision's criminal applications. Pet. App. 9a-10a.

This question—the relationship between *Chevron* and the rule of lenity in the context of "hybrid" statutes—is an important one that implicates basic principles of separation of powers and due process. See *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring). It is also a question with widespread practical consequences for criminal-defense and immigration attorneys and their clients. The Court should grant certiorari to resolve this question, and this case presents an appropriate vehicle for doing so.

Second, certiorari is warranted because the application below of the *Taylor* "categorical approach" departs dramatically from this Court's precedents and would have significant consequences for practitioners. Neither the Sixth Circuit nor the BIA attempted to define the relevant elements of the "generic crime" of "sexual abuse of a minor" and then to compare those elements to the elements of the statute of conviction, as this Court's case law requires. See *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013). Rather, the BIA adopted a "case-by-case" approach to defining the generic offense of "sexual abuse of a minor." Pet. App. 40a.

This approach led the BIA astray. Instead of looking to sources such as federal law, state law, and the Model Penal Code to define the relevant elements of the generic offense, as this Court has instructed, the

BIA concluded that a conviction under California Penal Code section 261.5(c) categorically qualifies as "sexual abuse of a minor" based on other factors, such as the BIA's policy judgment and its understanding of congressional intent. This Court consistently has rejected this view of the categorical approach. See *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016).

The BIA's understanding of the categorical approach, if followed elsewhere, would eliminate many of the substantial benefits of the categorical approach as this Court has defined it. An elements-focused approach to defining generic crimes provides certainty and predictability: it allows noncitizen criminal defendants and their attorneys to know in advance what the immigration consequences of potential convictions or guilty pleas will be. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015); see *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). The approach followed here would take away that predictability and certainty, and would force attorneys advising clients to engage in guesswork and speculation about the BIA's possible future treatment of state criminal offenses. The Court should grant certiorari to reaffirm the elements-focused nature of defining generic crimes under the categorical approach.

ARGUMENT

I. The Court Should Grant Certiorari to Determine Whether the Rule of Lenity Applies When a Court Confronts a Federal Statutory Provision that Has Both Civil and Criminal Applications and that an Agency Has Interpreted

In addition to the compelling arguments advanced by petitioner, the Court should grant the petition for a writ of certiorari because the Sixth Circuit's opinion rests squarely on that court's holding that the BIA's interpretation of the statutory term "sexual abuse of a minor" (8 U.S.C. § 1101(a)(43)(A)) enjoys *Chevron* deference without resort to the rule of lenity, notwithstanding the many criminal applications of section 1101(a)(43). Pet. App. 4a-10a. That holding directly implicates a fundamental question of statutory interpretation and constitutional law: When an ambiguous federal statutory provision has both civil and criminal applications, and a court is asked to interpret that provision, should the court apply the rule of lenity to narrow the potential punitive reach of the statute, or should the court instead under *Chevron* defer to an agency's interpretation of the provision at issue without first resorting to the rule of lenity?

The Sixth Circuit, while acknowledging that there were "compelling reasons" to apply the rule of lenity, Pet. App. 8a, declined to do so and instead simply afforded *Chevron* deference to the BIA's interpretation of the statutory terms "aggravated felony" and "sexual abuse of a minor." But this Court's prior decisions and

the important legal principles underlying them compel the conclusion that the rule of lenity, rather than *Chevron* deference, must apply when a court interprets an ambiguous statutory provision that has both civil and criminal applications. The Court should grant certiorari to address that question.

A. Section 1101(a)(43) Has Extensive Criminal Applications, with Substantial Penal Consequences

Section 1101(a)(43), the INA provision at issue in this case, has numerous and significant criminal applications. For example, it is a felony to aid or assist "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony)." 8 U.S.C. § 1327. Likewise, the federal failure-to-depart statute makes it a felony for immigrants convicted of an aggravated felony to remain in the country. See *id.* §§ 1253(a)(1), 1227(a)(2)(A)(iii).

Section 1101(a)(43) also substantially increases the sentencing exposure of those convicted of certain federal criminal offenses. For example, the maximum penalty authorized by statute for illegal reentry under 8 U.S.C. § 1326 is two years for a "simple" offense, meaning no enhancements based on predicate convictions, but 20 years if the defendant has been convicted of an aggravated felony. See *id.* § 1326(b)(2) (also identifying an intermediate penalty for those with prior non-aggravated-felony convictions). Similarly, a federal criminal defendant faces a maximum prison term of four years for "simple" failure to depart under 8 U.S.C. § 1253(a)(1), but he or she faces a maximum 10-

year prison term if previously convicted of an aggravated felony. See *id.*; § 1227(a)(2)(A)(iii).

These criminal law consequences under section 1101(a)(43) have widespread impact. The illegal reentry statute is the second-most prosecuted felony (after illegal entry) in the federal courts. Transactional Records Access Clearinghouse ("TRAC"), TRAC Reports, Prosecutions for 2014 (Dec. 5, 2014).[2] In 2013, illegal reentry cases accounted for 26 percent of all federal criminal sentencings and 83.3 percent of sentencings involving immigration offenses. U.S. SENTENCING COMMISSION, ILLEGAL REENTRY OFFENSES 9 (April 2015).[3] Moreover, of the 18,498 illegal reentry defendants sentenced in 2013, "slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2)" because of an aggravated felony conviction, instead of a two- or ten-year statutory maximum that otherwise would apply. *Id.*

Not surprisingly, then, federal courts routinely are called upon in criminal cases to determine what crimes rank as "aggravated felonies" within the meaning of section 1101(a)(43), including under the "sexual abuse of a minor" provision. See, *e.g.*, *United States v. Londono-Quintero*, 289 F.3d 147, 151 (1st Cir. 2002) (interpreting the aggravated felony of "sexual abuse of a minor," § 1101(a)(43)(A)); *United States v. Martinez*, 786 F.3d 1227, 1230-33 (9th Cir. 2015) (same); *United States v. Pacheco*, 225 F.3d 148, 153-55 (2d Cir. 2000) (interpreting the aggravated felony of "theft offense"

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[2] http://tracfed.syr.edu/results/9x20548211252a.html.

[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

§ 1101(a)(43)(G)); *United States v. Gamboa-Garcia*, 620 F.3d 546, 548-50 (5th Cir. 2010) (interpreting the aggravated felony of "an offense related to the obstruction of justice," § 1101(a)(43)(S)).

B. This Court Should Grant Certiorari to Reaffirm the Important Principle that the Rule of Lenity Applies When Courts Interpret Ambiguous Statutory Provisions Like Section 1101(a)(43) that Carry Both Civil and Criminal Applications

The question of whether the rule of lenity or *Chevron* applies when courts confront ambiguous statutory provisions that have both civil and criminal applications and that an agency has interpreted is an important one that warrants this Court's attention. See *Whitman*, 135 S. Ct. at 353-54 (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari) (expressing "receptive[ness] to granting" a petition for certiorari "properly presenting the question"); *Carter*, 736 F.3d at 729 (Sutton, J., concurring) (noting that "this question will return sooner or later"); *Hosh v. Lucero*, 680 F.3d 375, 383 (4th Cir. 2012) ("Deciding whether to apply the rule of lenity or whether to instead give deference to an agency interpretation is no small task."). Both this Court's cases and fundamental constitutional principles compel the conclusion that, contrary to the Sixth Circuit's holding here, the rule of lenity applies in that setting.

The latter half of the twentieth century has been marked by a sharp increase in statutory crimes. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*,

85 GEO. L.J. 775, 783 (1997). There are so many federal crimes now that it is difficult to count them, but there are at least several thousand. See, *e.g.*, JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004) (estimating that there are over 4,000 criminal statutes in the U.S. Code). Many of these federal statutes are "hybrid" statutes with both civil and criminal applications. Such statutes are especially prevalent in the regulatory context. Leading examples include the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*; and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* See Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1026.

This increasing overlap between civil and criminal regulatory statutes inevitably raises the question of how courts should go about construing ambiguous statutes with both civil and criminal applications.

It is a fundamental rule of statutory interpretation, "perhaps not much less old than construction itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.), that in construing a criminal statute, the "rule of lenity" requires that ambiguities be resolved in the defendant's favor. *Santos*, 553 U.S. at 514. The rule has its roots in two foundational principles of American law: first that "'fair warning'" should be given to the public of what the law forbids, and second that "because of the seriousness of criminal penalties ... legislatures and not courts should define

criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). This same separation-of-powers principle underlies the Court's repeated emphasis that *Chevron* deference has no role to play when it comes to the interpretation of criminal statutes, which "are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

It is also well established that, where a single statute has both civil and criminal applications, courts "must interpret the statute consistently, whether [they] encounter its application in a criminal or non-criminal context." *Leocal*, 543 U.S. at 11 n.8; see also, *e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); *FCC v. ABC*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."). The rationale for this unitary-meaning principle is that, as Judge Sutton aptly put it, "[s]tatutes are not 'chameleons' that mean one thing in one setting and something else in another." Pet. App. 18a.

Putting these two rules together leads to the conclusion that the rule of lenity must be applied to "hybrid" statutes with both civil and criminal applications. The Court's opinions say as much. See *Leocal*, 543 U.S. at 11 n.8; *FCC v. ABC*, 347 U.S. at 296; *United States v. Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion) (rule of lenity applied to interpretation of civil tax provision with criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing that the rule of lenity applies); cf. *Clark*, 543

U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."). Indeed, in *Leocal*, the government itself acknowledged that deference to agency interpretation of a criminal statute is unwarranted even where that statute also has civil applications. See Brief for Respondent, *Leocal v. Ashcroft*, No. 03-583, 2004 WL 1617398 (July 14, 2004), at *32-33.[4]

Notwithstanding these authorities, federal courts often fail to follow this rule, as this case illustrates. They sometimes defer to agency interpretations of ambiguous "hybrid" statutory provisions, even in criminal cases, without applying the rule of lenity. See *Whitman*, 135 S. Ct. at 353 (Scalia, J., statement respecting denial of certiorari) (noting that Court of Appeals affirmed criminal conviction by deferring to interpretation of Securities and Exchange Commission); *United States v. Flores*, 404 F.3d 320, 326-27 (5th Cir. 2005); *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004); see also Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1,

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[4] In concluding otherwise, the Sixth Circuit placed dispositive weight on a footnote in this Court's opinion in *Babbitt*, 515 U.S. at 704 n.18. See Pet. App. 9a. For the reasons explained in Judge Sutton's dissent, however, the court's reliance on the *Babbitt* footnote is misplaced. See Pet. App. 23a-24a. Regardless, the fact that the Sixth Circuit believed its conclusion was compelled by one of this Court's cases—one at odds with the Court's other cases cited above—further highlights the need for this Court's intervention here. See *infra* at 15-16.

41 (2006) (noting that "[c]ourt of appeals decisions indicate a split of opinion on the issue of how *Chevron* interacts with the rule of lenity" and describing varying approaches taken by courts).

Applying *Chevron* instead of the rule of lenity poses a unique threat to important constitutional values, including separation of powers, due process, and equal protection. It would give Executive Branch officials the power to "in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman*, 135 S. Ct. at 353 (Scalia, J., statement respecting denial of certiorari); see also *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (noting that deference would "giv[e] unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison"). It would also "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

Deference to agency interpretation of "hybrid" statutes must be viewed in the context of other recent developments in criminal law. In particular, "a trend is evident toward the diminution of the mental element (or 'mens rea') in crime, particularly in many regulatory offenses." John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198 (1991). Unclear mens rea requirements "create an environment of uncertainty and unpredictability over exactly what acts are criminal." BAKER, *supra*, at 3. Layering *Chevron* deference on top of this uncertainty and unpredictability would only exacer-

bate that trend. It would also raise serious equal protection concerns. "[W]hen the criminal code comes to cover so many facets of daily life, ... prosecutors can almost choose their targets with impunity," Neil M. Gorsuch, *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743, 748 (2014), a problem compounded by *Chevron* deference. Individuals disfavored by the government for one reason or another could well become the target of prosecutions based on ambiguous statutes. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2-5 (2011). These weighty concerns underscore the importance of this issue and the need for this Court to provide guidance to lower courts.

C. This Case Is a Good Vehicle for Addressing the Applicability of the Rule of Lenity in Cases Involving "Hybrid" Civil–Criminal Statutory Provisions

For three reasons, this case presents an appropriate opportunity for the Court to clarify the applicability of the rule of lenity to "hybrid" statutes.

First, the Sixth Circuit's opinion unmistakably rests on its conclusion that *Chevron* deference trumps the rule of lenity in construing "hybrid" statutes. See Pet. App. 4a-5a; 11a. Indeed, it was the only point on which the majority opinion and the dissent disagreed. *Id.* at 16a. Neither the Sixth Circuit majority nor the government has suggested that the term "sexual abuse of a minor" *unambiguously* encompasses petitioner's California conviction. The other circuits whose positions align with the Sixth Circuit also rest their analyses on deference to the BIA's position under *Chevron*. See Pet. 13 (describing cases from the Second, Third,

and Seventh Circuits); see also *Contreras v. Holder*, 754 F.3d 286, 293 (5th Cir. 2014). Thus, unlike other cases in which the issue might have been raised, see *Whitman*, 135 S. Ct. at 354 (Scalia, J., statement respecting denial of certiorari) (noting that "the procedural history of the case ... makes it a poor setting in which to reach the question"), here there will be no procedural obstacle to the Court in reaching the issue—unless, of course, the Court were to conclude that the California statute unambiguously does *not* constitute "sexual abuse of a minor," in which case a grant of certiorari is warranted on that question, for the reasons explained in the Petition.

Second, it is not just a hypothetical possibility that affording *Chevron* deference to the BIA's interpretation of "aggravated felony" and "sexual assault of a minor," will have implications in criminal cases. On the contrary, as discussed above, *supra* at 8, federal courts regularly are called upon to determine what crimes constitute "aggravated felonies" in criminal cases—including under the precise "sexual abuse of a minor" provision at issue here. See *Londono-Quintero*, 289 F.3d at 152-55; *Martinez*, 786 F.3d at 1230-33. The Sixth Circuit's opinion, if it remains on the books, will govern future criminal cases in that circuit under the unitary-meaning rule discussed above. *Supra* at 11. This case thus may be a better vehicle in which to address the issue than a case involving a federal statutory provision only rarely invoked or interpreted in criminal prosecutions.

Third, the issue now clearly is ripe for this Court's consideration. Both the Sixth Circuit majority opinion and the dissent extensively analyzed the interplay between the rule of lenity and *Chevron* deference, and

engaged in a Talmudic effort to parse and reconcile this Court's precedents. Only this Court can resolve the tension both the majority opinion and dissent below identified between the footnote in *Babbitt* and the rest of this Court's precedents. See Pet. App. 9a-10a, 23a-24a.

II. Certiorari Is Warranted Because the BIA's and the Sixth Circuit's Mistaken Understanding of the Categorical Approach Would Entail Significant Practical Consequences for Attorneys and Their Clients

As explained in the Petition (at 22-23), this case required the BIA and the Sixth Circuit to apply the "categorical approach" of *Taylor* and its progeny to determine whether a conviction under California Penal Code section 261.5(c) is categorically "sexual abuse of a minor." The BIA's and the Sixth Circuit's conclusion that a conviction under section 261.5(c) categorically *is* "sexual abuse of a minor" stems from a failure to apply the categorical approach in the way this Court has prescribed. Were the type of "categorical approach" applied here to be followed in other cases, it would transform an already-complex statutory scheme into a confusing maze that would significantly hamper both criminal-defense and immigration attorneys in giving sound advice to their clients.

A. The BIA and the Sixth Circuit Failed to Define the Relevant Elements of the Generic Offense of "Sexual Abuse of a Minor," Leading to the Erroneous Result in This Case

The BIA correctly recognized that this case calls for the application of the *Taylor* categorical approach. Pet. App. 31a-32a.[5] This approach asks "whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248. To apply this approach, courts and agencies must "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps*, 133 S. Ct. at 2281. "The prior conviction qualifies" as a federal predicate crime "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.*

The generic offense at issue here is "sexual abuse of a minor," which this Court has recognized is a type of generic offense for purposes of applying the categorical approach. *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009). Because sexual abuse of a minor "is a 'generic crim[e]' ... the categorical approach applies." *Moncrieffe*, 133 S. Ct. at 1685 (alteration in original).

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[5] As the BIA recognized, this case does not call for application of the "modified categorical approach" (see *Mathis*, 136 S. Ct. at 2249) because "section 261.5(c) of the California Penal Code is not divisible as to the definition of sexual abuse of a minor." Pet. App. 31a.

The foundational step in applying the categorical approach is to define the relevant elements of the generic offense—otherwise, no "compar[ison]" of the elements to the crime of conviction is possible. *Descamps*, 133 S. Ct. at 2281; see also *id.* at 2283 (noting that the "key" to the categorical approach "is elements"). But neither the BIA nor the Sixth Circuit attempted to define the relevant elements of generic "sexual abuse of a minor." Rather, the BIA believed that "given the large number and variety of statutes that are potentially at issue" and could constitute "sexual abuse of a minor," "we must, as a practical matter, evaluate statutes individually and define 'sexual abuse of a minor' under the Act on a case-by-case basis." Pet. App. 40a. That reflects a basic misunderstanding of the categorical approach. While agencies no doubt may proceed through case-by-case adjudication, the very nature of the categorical approach *requires* an identification of the relevant elements of the generic crime *in every case*, so that the elements of the crime of conviction may be compared to it. See *Descamps*, 133 S. Ct. at 2283.

The BIA's and the Sixth Circuit's failure to define the relevant elements of generic "sexual abuse of a minor" led them astray in this case. To define the elements of a generic crime, courts must look to sources such as federal law, the laws of the 50 states, the Model Penal Code, and treatises. See, *e.g.*, *Taylor*, 495 U.S. at 596-99; *Scheidler*, 537 U.S. at 410. In this case, as explained in the Petition (at 23-26), consulting any of those sources—let alone all of them—would have pointed the BIA and the Sixth Circuit toward the correct conclusion that a conviction under California

Penal Code section 261.5(c) is not categorically "sexual abuse of a minor."

The California statute criminalizes consensual sex between a 21-year-old and a person just under 18. Yet federal law does not criminalize that conduct, and the federal crime labeled "sexual abuse of a minor" does not encompass it. See Pet. 23-24; 18 U.S.C. § 2243(a). The overwhelming majority of states do not criminalize such conduct either: it is entirely legal in 43 states; it is punishable as a felony in only three; and *only one state* (Oregon) characterizes it as "sexual abuse" (where it is "third degree" sexual abuse, punishable only as a misdemeanor). See Pet. 25-27 & n.7; Or. Rev. Stat. 163.415.[6] This is nowhere close to the level of consensus needed to define a generic offense. See, *e.g.*, *Taylor*, 495 U.S. at 598 ("We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes *of most States*.") (emphasis added); *United States v. Flores-Granados*, 783 F.3d 487, 493-95 (4th Cir. 2015) (Wilkinson, J.) (concluding that the generic definition of kidnapping requires some "element of heightened intent" because "only eight states and the District of Columbia do not include a heightened intent requirement" in their kidnapping statutes). Nor does the Model Penal Code criminalize the conduct at issue. See Pet. 26; Model Penal Code § 213.3(1)(a).

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[6] It is not surprising that only a single jurisdiction describes this type of consensual sex as sexual abuse, since—as the BIA itself has recognized in other contexts—"abuse" necessarily entails some form of "cruelty" or "maltreatment." *In re Rodriguez-Rodriguez*, 22 I & N. Dec. 991, 996 (1999). California also does not describe the relevant conduct as "abuse." See Pet. 26; *In re Kyle F.*, 112 Cal. App. 4th 538, 543 (2003).

The BIA's failure to identify the relevant elements of generic "sexual abuse of a minor" allowed the agency to apply the categorical approach in a manner this Court has specifically rejected. The BIA did so in an open effort to evade the consequences of the categorical approach as defined by the Court. The BIA considered it "noteworthy" that "[i]f we were to conclude that the offense at issue here is not categorically 'sexual abuse of a minor,' sexual offenders who were prosecuted under this statute for victimizing children under the age of 16 would not be removable for having committed a 'sexual abuse of a minor' aggravated felony under the Act." Pet. App. 39a n.7. That flawed reasoning turns the categorical approach on its head. Rather than considering the *least* culpable conduct criminalized by a state statute and comparing that conduct to the generic offense, the BIA identified the *most* culpable conduct and justified its categorical treatment of section 261.5(c) on that basis. Yet a majority of the Court has rejected this criticism of the consequences of the categorical approach. Compare *Mathis*, 136 S. Ct. at 2268 & n.2 (Alito, J., dissenting), with *id.* at 2254 & n.5 (majority opinion).

The Court should grant the petition not just to resolve the deep split regarding the proper treatment of California Penal Code section 261.5(c) and similar state statutes, but also to clarify the proper application of the categorical approach and prevent further misapplications of it like the one in this case.

B. The Misapplication of the Categorical Approach in This Case Would Create Major Difficulties for Attorneys and Their Clients

The erroneous understanding of the categorical approach reflected in the Sixth Circuit's and BIA's opinions here would, if widely adopted, have a significant and detrimental impact on the practice of both criminal law and immigration law. A key rationale for the categorical approach is that "the practical difficulties and potential unfairness" of any other approach "are daunting." *Taylor*, 495 U.S. at 601; *Descamps*, 133 S. Ct. at 2289. The approach used in this case would invite such practical difficulties and unfairness.

Persons accused of crimes (and their lawyers) often are keenly interested in whether a potential conviction will trigger collateral consequences, such as an enhanced sentence under the Armed Career Criminal Act (ACCA) or, as here, mandatory removal under the INA. Indeed, criminal-defense attorneys have a duty to advise their noncitizen clients regarding the potential immigration consequences of criminal convictions. *Padilla*, 559 U.S. at 367. The categorical approach facilitates the performance of this duty: it "works to promote efficiency, fairness, and predictability in the administration of immigration law" by enabling noncitizens and their attorneys "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (alterations and internal quotation marks omitted).

A categorical approach focused on generic crimes and elements achieves that end. An attorney who needs to determine whether a particular state conviction will qualify as an "aggravated felony" knows where to look: to federal law, the laws of the states, and the Model Penal Code. She can rely on the definition of generic crimes that she finds there. Under the Sixth Circuit's and the BIA's approach, by contrast, she would have no such certainty. The BIA might later conclude that a particular crime is an aggravated felony—notwithstanding (as here) the contrary guidance of at least 43 states, the federal government, and the Model Penal Code—based on sources that have nothing to do with the law.

In this case, for instance, the BIA's determination that a conviction under section 261.5(c) is "sexual abuse of a minor" rested largely on factors such as the BIA's understanding of congressional intent, see Pet. App. 12a, 38a, and its policy judgment. The BIA extensively discussed and cited an article in the *Journal of Family Planning Perspectives* in support of its conclusion that "the risk of coercion" in a sexual relationship "is particularly great when the victim is not in the same peer group," and "having an age differential of 'more than three years' helps ensure that the victim and the perpetrator are not in the same peer group ... because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior." Pet. App. 35a-36a. And the Sixth Circuit concluded that this approach warranted *Chevron* deference. *Id.* at 11a-12a.

This is not the way the definition of generic crimes works under the categorical approach. It is hardly

reasonable to expect criminal-defense attorneys to consult sources such as the *Journal of Family Planning Perspectives* in seeking to determine whether a criminal conviction constitutes an aggravated felony. Yet, under the BIA's and the Sixth Circuit's approach here, a diligent criminal-defense attorney would have to consider the possibility that far-flung sources like these might lead the BIA to deem a state crime an aggravated felony.

The BIA believed its "case-by-case" approach to defining the generic crime of "sexual abuse of a minor" was justified due to the "large number and variety of statutes that are potentially at issue." Pet. App. 40a. Far from supporting the BIA's rationale, this consideration highlights why an articulation of the generic elements of "sexual abuse of a minor" is *essential* to make the categorical approach work. Criminal-defense and immigration attorneys will be called upon to advise their clients whether that "large number and variety of statutes" will be deemed "sexual abuse of a minor" or any one of the other "aggravated felonies" defined in section 1101(a)(43)—a task made only more difficult by the "crazy-quilt" patchwork of different circuits' treatment of different states' penal statutes, see Pet. 19. Even crimes that are misdemeanors in most or all states—or that, like here, reach conduct generally not criminalized at all—might be deemed aggravated felonies.

In sharp contrast to the elements-focused approach to defining generic crimes that this Court's precedents require, the BIA's "case-by-case" approach will leave attorneys and their clients at sea without a compass in determining whether those multitude of crimes rank as aggravated felonies. And the problem is only made

worse when the BIA's "case-by-case" determinations are afforded *Chevron* deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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QUESTION PRESENTED

Under federal law, the Model Penal Code, and the laws of 43 states and the District of Columbia, consensual sexual intercourse between a 21-year-old and someone almost 18 is legal. Seven states have statutes criminalizing such conduct.

The question presented is whether a conviction under one of those seven state statutes constitutes the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act—and therefore constitutes grounds for mandatory removal.

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Other Authorities

Miller, Kim S. et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212 (1997) 10, 28

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Senn, Theresa E. et al., *Characteristics of Sexual Abuse in Childhood and Adolescence Influence Sexual Risk Behavior in Adulthood*, 36 Arch. Sex Behav. 637 (2007) 29

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BRIEF FOR PETITIONER

Petitioner Juan Esquivel-Quintana respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is reported at 810 F.3d 1019. The opinion of the Board of Immigration Appeals, Pet. App. 27a, is reported at 26 I. & N. Dec. 469. The decision of the Immigration Judge, which appears at pages 150-58 of the Certified Administrative Record, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 15, 2016. The court of appeals denied a timely petition for rehearing en banc on April 12, 2016. Pet. App. 42a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), provides in relevant part: "The term 'aggravated felony' means—(A) murder, rape, or sexual abuse of a minor . . . ."

Cal. Penal Code § 261.5 provides in relevant part:

> (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years . . . .
>
> . . .

> (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.
>
> (d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

Other relevant provisions of the U.S. Code—specifically, 18 U.S.C. §§ 2241, 2243, and 3509—are reproduced at Pet. App. 43a-65a.

STATEMENT OF THE CASE

The Immigration and Nationality Act (INA) categorizes certain crimes as "aggravated felonies." When there is no readily apparent uniform definition for a specified crime, this Court has instructed that it should be construed according to the definition that predominates among criminal codes. Yet in this case, the Sixth Circuit accepted the BIA's determination that conduct that is *legal* under federal law, the Model Penal Code, and the laws of 43 states plus the District of Columbia constitutes an aggravated felony. Specifically, the Sixth Circuit held that the INA provision listing "sexual abuse of a minor" as an aggravated felony includes consensual sex between a 21-year-old and someone almost 18—thereby subjecting petitioner to mandatory removal.

A. Legal Background

1. Under the INA, lawful permanent residents (and other noncitizens) convicted of certain crimes can be subject to adverse immigration consequences, including deportation. *See* 8 U.S.C. § 1227(a)(2). These noncitizens may typically ask the Attorney General for certain forms of discretionary relief from removal. *See id.* §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure).

But discretionary relief from deportation is not an option if the noncitizen is convicted, under state or federal law, of a crime that the INA classifies as an "aggravated felony." Noncitizens convicted of aggravated felonies are subject to mandatory removal, meaning they are ineligible for any form of relief. *See* 8 U.S.C. §§ 1158(b)(2), 1229b(a)(3), 1229c(a)(1); *see also id.* § 1227(a)(2)(A)(iii). Once removed from the United States, an individual convicted of an aggravated felony is barred from readmission or naturalization. *See id.* §§ 1182(a)(9)(A), 1101(f)(8), 1427(a). And if such individuals are convicted of reentering illegally, they may receive up to 20-year sentences. *Id.* § 1326(b)(2).

The INA defines "aggravated felony" to include a list of criminal offenses—for example, "murder" and "drug trafficking." *See* 8 U.S.C. § 1101(a)(43). But state laws defining certain crimes sometimes differ from one another in their particulars, and can differ from their federal law analogs as well. Furthermore, it is often difficult, sometimes impossible, for courts to ascertain the exact facts underlying prior convictions. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986-87 (2015). Thus questions frequently arise

concerning whether a conviction under a state law proscribing conduct seemingly similar to an offense listed under Section 1101(a)(43) constitutes an "aggravated felony" and thus is grounds for mandatory deportation.

2. To resolve whether a state conviction qualifies as an "aggravated felony" under the INA, this Court employs what is known as the "categorical approach"—an interpretive method also used under certain sentencing enhancement statutes. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under the categorical approach, the "actual conduct" that led to a noncitizen's conviction is "irrelevant." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (Hand, J.)). Instead, courts focus on the elements of the state statute of conviction to determine whether "the least of th[e] acts criminalized" by the statute necessarily falls within the offense referenced in the INA. *Id.* (alteration in original) (quotation marks omitted). And when there is not a "readily apparent" uniform federal definition of the referenced offense, courts conduct this analysis against the "generic" conception of the offense—the archetypal version of the crime representing "[t]he prevailing view [of the offense] in the modern codes." *Taylor v. United States*, 495 U.S. 575, 580, 598 (1990) (quotation marks omitted). If the state statute of conviction sweeps in conduct that would not fit within the generic offense, then a conviction under that statute does not constitute an

aggravated felony. *See Moncrieffe*, 133 S. Ct. at 1684.[1]

This Court's decision in *Taylor* illustrates the categorical approach at work. There, this Court considered whether a state burglary conviction satisfied the generic definition of "burglary." 495 U.S. at 579-80. The state where the defendant had been convicted had a statute criminalizing not only unauthorized entries into buildings and structures, but also unauthorized entries into vessels and railroad cars. *Id.* at 599. Yet after consulting the Model Penal Code and surveying criminal codes across the country, this Court concluded that "generic" burglary covers entries only into buildings or structures. *Id.* at 598-99, 598 n.8. Accordingly, the state statute swept more broadly than the generic definition. And so, convictions under that statute—regardless of the actual facts leading to them—could not be treated as convictions for "burglary" under the federal statute at issue. *See id.* at 599, 602.

The categorical approach "has a long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1685; *see also Mellouli*, 135 S. Ct. at 1986. Federal courts and immigration judges have applied the approach in immigration proceedings for nearly a

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[1] There are more complicated versions of the categorical approach, such as the "modified categorical approach" for dealing with "divisible" state statutes. *Mathis*, 136 S. Ct. at 2249. But this case involves the "straightforward" situation where this Court asks simply whether the state-law offense of conviction is in some way broader than the "generic" offense. *Id.* at 2248; *see also* Pet. App. 31a (noting that Cal. Penal Code § 261.5(c) is not divisible).

century. *See Moncrieffe*, 133 S. Ct. at 1685. And the categorical approach's method of "err[ing] on the side of underinclusiveness," *id.* at 1693, "works to promote efficiency, fairness, and predictability in the administration of immigration law," *Mellouli*, 135 S. Ct. at 1987.

B. Factual and Procedural Background

1. When petitioner Juan Esquivel-Quintana was 12 years old, he moved with his parents to the United States with an immigrant visa and became a lawful permanent resident. Pet. App. 3a, 28a; Certified Administrative Record (CAR) 217. His parents, four siblings, and much of his extended family currently live in the United States. CAR 217-18. All of them are either lawful permanent residents or U.S. citizens. *Id.*

Esquivel-Quintana had no trouble with the law until 2009, when, while living outside of Sacramento, California, he was charged with violating Cal. Penal Code § 261.5(c). That statute is among the strictest of all state laws governing sexual relations when one partner is under a certain age. It criminalizes consensual "sexual intercourse" with an individual "under the age of 18 years" whenever the parties are "more than three years" apart in age. Cal. Penal Code § 261.5(a), (c). According to the State's charging papers, Esquivel-Quintana had consensual sex with his 16-year-old girlfriend beginning when he was 20 years old. CAR 66-67, 214.

The INA defines "aggravated felony" to include "murder, rape, or *sexual abuse of a minor*." 8 U.S.C. § 1101(a)(43)(A) (emphasis added). Before Esquivel-Quintana was charged, an en banc panel of the Ninth Circuit had unanimously held that a conviction under

Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc). The Ninth Circuit explained that 18 U.S.C. § 2243 (the federal law criminalizing "sexual abuse of a minor"), the Model Penal Code's counterpart to that offense, and the laws of 43 states exclude the least culpable of the acts criminalized under Cal. Penal Code § 261.5(c)—"sexual intercourse between a 21-year-old and someone about to turn 18"—from their reach. *See id.* at 1152-53. Consequently, that statute sweeps more broadly than the generic definition of "sexual abuse of a minor." *Id.* at 1158-59.

Against this backdrop, Esquivel-Quintana pleaded no contest to the Cal. Penal Code § 261.5(c) charge. CAR 209. He was sentenced to 90 days in jail and five years' probation. Pet. App. 29a; CAR 209.

2. After being released from jail, Esquivel-Quintana moved from California to Michigan, where some members of his family live. Pet. App. 3a; CAR 217-18. In Michigan, as under federal law, the conduct underlying Esquivel-Quintana's California conviction is not a crime. *See* Mich. Comp. Laws § 750.520d.

Having apparently learned from a California probation officer that Esquivel-Quintana had moved, the Government arrested him in Michigan and initiated removal proceedings against him. The Government alleged that his California conviction constituted the "aggravated felony" of "sexual abuse of a minor." Pet. App. 3a.

Esquivel-Quintana urged the Immigration Judge (IJ) to follow the Ninth Circuit's reasoning in *Estrada-Espinoza* and hold that his conviction did

not constitute "sexual abuse of a minor" under the INA. CAR 154. The Government reminded the IJ she was sitting within the Sixth Circuit and urged her to reject the Ninth Circuit's analysis. *Id.* 152, 189-91.

The IJ adopted the Government's position and ordered Esquivel-Quintana removed from the United States. Pet. App. 3a; CAR 153-58. The IJ acknowledged that this Court's precedent required her to "appl[y] the categorical approach" to determine whether a conviction under Cal. Penal Code § 261.5(c) falls within "the generic federal definition" of "sexual abuse of a minor." CAR 153, 155. But the IJ did not consult a multi-jurisdictional survey along the lines of those in *Taylor* and other cases. Instead, she reasoned that because "states categorize and define sex crimes against children in many different ways," it was permissible to look elsewhere for guidance in discerning the boundaries of the generic crime of "sexual abuse of a minor." *Id.* 156 (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999)).[2] Taking that license, the IJ looked to 18 U.S.C. § 3509(a), a statute establishing various procedural rights (such as the right to testify via closed-circuit television) for victims of sexual abuse. Because that statute defines "sexual abuse" of a

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[2] *Rodriguez-Rodriguez* involved the question whether generic crime of "sexual abuse of a minor" requires physical contact. *See* 22 I. & N. Dec. at 991-92. A dissent from the BIA's holding that it does not faulted the majority for refusing to resolve that issue consistently with the federal criminal definition of "sexual abuse of a minor" in 18 U.S.C. § 2243 and the vast majority of states' criminal codes. *See id.* at 1000-01 (Guendelsberger, dissenting).

"child" as "sexually explicit conduct" with "a person who is under the age of 18," *see* 18 U.S.C. § 3509(a)(2)(A), (a)(8), the IJ held that the aggravated felony of "sexual abuse of a minor" does too, *see* CAR 156-57, 156 n.2; *see also id.* 190.

3. A three-member panel of the BIA affirmed. Like the IJ, the BIA purported to apply the categorical approach. Pet. App. 32a. But also like the IJ, the BIA declined to consult any multi-jurisdictional compilation of the relevant criminal laws. The variations among state statutes, the BIA asserted, would make it "difficult, if not impossible, to determine whether a majority consensus exists" with respect to *every* element of "sexual abuse of a minor." *Id.* 39a (quotation marks omitted). So the BIA concluded it did not need to determine whether a consensus exists with respect to *any* element. *Id.* 40a.

Freed from the strictures of *Taylor* and its progeny, the BIA consulted a smattering of sources besides substantive criminal laws to determine the maximum age and age differential elements of "sexual abuse of a minor." *See* Pet. App. 29a-39a. First and foremost, the BIA referenced one of its own prior decisions, *In re V-F-D-*, 23 I. & N. Dec. 859 (B.I.A. 2006), which had defined "minor" as someone under 18 because Section 3509(a)(2)'s definition of "child" does so. Pet. App. 30a; *see also V-F-D-*, 23 I. & N. Dec. at 861-62. The BIA also pointed to a judicial opinion in a civil case involving abortion rights and an article in a 20-year-old family planning journal discussing HIV prevention, which had both expressed concern for women who engage in sexual activity before the age of 18. Pet. App. 35a-36a (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); Kim S. Miller et

al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997)).

The BIA acknowledged that consensual sex involving 16- or 17-year-olds is not "categorically 'abusive'"—another requirement for "sexual *abuse* of a minor." Pet. App. 36a-37a (emphasis added). But the BIA stressed that such conduct is abusive "in certain circumstances," such as when "a 16-year-old high school student" has sex with "his or her school teacher." *Id.* 34a & n.4. From this, the BIA concluded that "outside of the Ninth Circuit," the generic crime of "sexual abuse of a minor" covers sex with someone under 18 so long as there is a "meaningful" age differential between the two partners. *Id.* 34a, 40a. The BIA then held that the three-year differential that Cal. Penal Code § 261.5(c) requires is "sufficient" to be "meaningful." *Id.* 40a.

4. A divided panel of the Sixth Circuit denied Esquivel-Quintana's petition for review. Like the IJ and the BIA, the Sixth Circuit never consulted a multi-jurisdictional survey. Instead, the majority simply declared that, because the INA does not define the phrase "sexual abuse of a minor," the parameters of that generic crime are "ambiguous." Pet. App. 11a.

Faced with that ostensible ambiguity, the majority considered whether to apply the framework of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires courts in certain settings to defer to agencies' "reasonable construction[s]" of ambiguous statutes. *Id.* at 840. The Sixth Circuit saw "compelling reasons" to hold that the rule of lenity foreclosed resorting to *Chevron*—and thus to hold that the

ambiguity it perceived here had to be resolved in Esquivel-Quintana's favor. Pet. App. 8a. But it nonetheless deferred to the BIA's resolution of the ambiguity against him. Citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), an environmental case where this Court afforded deference to a Department of the Interior regulation having both civil and criminal applications, *see id.* at 704 n.18, the majority announced it "must follow *Chevron* in cases involving the Board's interpretation[] of immigration laws," even where, as here, those laws have criminal applications, Pet. App. 10a.

Applying *Chevron*, the Sixth Circuit held the BIA's conclusion that Cal. Penal Code § 261.5(c) falls within the generic crime of "sexual abuse of a minor" was "permissible" because various statutes define "minor" as someone under 18. Pet. App. 11a-13a. The majority did not consider at any length whether it was reasonable to conclude that sex between a 21-year-old and someone almost 18 falls within the generic meaning of "sexual abuse."

Judge Sutton disagreed with the majority that a conviction under Cal. Penal Code § 261.5(c) constitutes "sexual abuse of a minor." Pet. App. 16a-26a (opinion concurring in part and dissenting in part). He deemed this case "a classic occasion for applying the rule of lenity" because the rule of lenity applies to all criminal statutes, and this case involves an ambiguous statute with both removal and criminal applications. *Id.* 21a. And Judge Sutton saw nothing in this Court's precedent precluding this conclusion. To the contrary, Judge Sutton noted that "an entire line of cases" forecloses resorting to

Chevron in this setting, and that *Babbitt* "expressly limits itself" to facial challenges to agency regulations. *Id.* 23a-24a.

5. The Sixth Circuit denied Esquivel-Quintana's petition for rehearing en banc. Pet. App. 42a.

6. This Court granted certiorari. 137 S. Ct. 368 (2016).

SUMMARY OF ARGUMENT

Petitioner's conviction under Cal. Penal Code § 261.5(c) does not constitute the "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the INA.

I. The question whether a state conviction constitutes an "aggravated felony" turns on whether the least culpable acts criminalized under the statute necessarily fall within the crime the INA references. And where there is no readily apparent uniform federal definition of that crime, this Court conducts the categorical approach against the "generic" definition of that crime. The generic definition of a crime, in turn, depends on the prevailing way the offense is defined under federal and state criminal laws, as well as the Model Penal Code.

A multi-jurisdictional analysis here shows that federal law, the Model Penal Code, and the laws of 43 states consider the least of the acts criminalized under Cal. Penal Code § 261.5(c)—consensual sex between a 21-year-old and someone almost 18—to be entirely lawful. Six of the seven remaining states deem it not sufficiently serious to be treated as "sexual abuse." And the text and structure of the INA reinforce the soundness of excluding this conduct from the reach of the aggravated felony of "sexual

abuse of a minor." Accordingly, whatever the full generic definition of "sexual abuse of a minor" may be, it must exclude consensual sex between a 21-year-old and someone almost 18.

The Sixth Circuit and the BIA reached a different conclusion only by declining to use a multi-jurisdictional survey and instead consulting a smattering of procedural and civil sources that do not even purport to define crimes. But this Court's precedent precludes such a freewheeling approach. Even if it did not, allowing courts and the BIA to proceed in this manner would create massive administrative difficulties and drain the categorical approach of the efficiency and predictability it is designed to guarantee.

II. The BIA's determination that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor" under the INA is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Chevron does not come into play unless a statute is ambiguous after courts have exhausted all traditional tools of statutory construction. And here, the time-honored categorical approach yields a clear answer to the question whether a conviction under Cal. Penal Code § 261.5(c) constitutes "sexual abuse of a minor." Even if this Court were to conclude that the categorical approach does not dictate the outcome here, two other traditional tools of interpretation would resolve any remaining ambiguity. First, this Court has stressed time and again that ambiguity in statutes triggering deportation must be construed in favor of the noncitizen. Second, the longstanding rule of lenity requires ambiguities in statutes with

criminal applications to be construed narrowly. Even though the INA's "sexual abuse of a minor" provision is being applied here in a civil setting, the criminal rule of lenity applies because that provision also has criminal applications. A "hybrid" statute like this cannot mean different things in different settings; the least common denominator must govern.

Even if ambiguity triggering *Chevron* somehow existed, the BIA's determination here would still not be entitled to deference because the BIA's construction of Section 1101(a)(43)(A) is unreasonable. The BIA ignored the requirement that it assess the parameters of generic crimes according only to substantive criminal statutes. The BIA also flouted the categorical approach's requirement to compare those parameters only to the least of the acts criminalized under the state statute at issue. Finally, the BIA failed to resolve any lingering ambiguities against requiring deportation.

ARGUMENT

The first step in any statutory interpretation case is to determine whether traditional tools of statutory interpretation provide a clear answer to the issue. Here, a straightforward application of the categorical approach fully resolves this case. Even if it did not, the Sixth Circuit's holding would still be incorrect.

I. The Categorical Approach Dictates that a Conviction Under Cal. Penal Code § 261.5(c) Does Not Constitute "Sexual Abuse of a Minor."

The categorical approach dictates that, whatever the full generic definition of "sexual abuse of a minor" may be, the definition excludes the least culpable conduct criminalized under Cal. Penal Code

§ 261.5(c): consensual sex between a 21-year-old and a person who is almost 18.

A. A Multi-Jurisdictional Survey Demonstrates that the Least Culpable Acts Criminalized Under Cal. Penal Code § 261.5(c) Fall Outside the Generic Definition of "Sexual Abuse of a Minor."

1. Where there is no "readily apparent" uniform federal definition of a designated aggravated felony, the categorical approach requires comparing the elements of the state statute of conviction against the "generic" conception of the designated offense—the archetypal version of the crime representing "[t]he prevailing view in the modern codes." *Taylor v. United States*, 495 U.S. 575, 580, 598 (1990) (quotation marks omitted); *see also Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016) ("generic" offense means "the offense as commonly understood"). Thus, inasmuch as "sexual abuse of a minor" is a generic offense, this Court's precedent instructs that its parameters must be derived from a survey of federal criminal law, the Model Penal Code, and states' criminal codes. *See, e.g., Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 189 (2007); *Taylor*, 495 U.S. at 596-98, 598 n.8. And if that survey reveals a consensus regarding the generic crime that excludes conduct covered by the state statute at issue, that consensus controls. *See Taylor*, 495 U.S. at 598-99.

Taylor is the foundational case in this respect. There, "41 states" and the Model Penal Code included within the definition of "burglary" any illegal entry into a building or similar structure. U.S. Br. 16 & n.7, *Taylor v. United States*, 495 U.S. 575 (1990) (No. 88-

7194) (50-state survey); *see also Taylor*, 495 U.S. at 598-99, 598 n.8. That consensus did not extend to illegal entries into other types of places, such as railway cars or boats. *Taylor*, 495 U.S. at 599. In light of this limitation "in the criminal codes of most states," this Court held that a state law criminalizing illegal entries into places besides buildings or structures fell outside of the generic crime of burglary. *See id.* at 598-99, 602.

Taylor grounded this analysis in precedent interpreting the Travel Act, 18 U.S.C. § 1952, a criminal statute that likewise requires courts to determine generic definitions of certain crimes. *See Taylor*, 495 U.S. at 592. Most notably, in *Perrin v. United States*, 444 U.S. 37 (1979), the Court had to determine whether, under the Travel Act, the generic crime of "bribery" encompassed bribery of private individuals. *Id.* at 41-42. A total of "42 States and . . . federal legislation," as well as the Model Penal Code, defined the crime to include such individuals. *Id.* at 45 & n.11. That consensus dictated that a conviction under a state statute criminalizing "commercial bribery" qualified as a conviction for "bribery" within the meaning of the Travel Act. *Id.* at 45, 50.

This Court has likewise conducted multi-jurisdictional analyses when applying the categorical approach under the INA. In *Duenas-Alvarez*, for example, the Court used a "comprehensive" analysis of state and federal laws—complete with appendices listing the relevant laws of every state—to determine whether California's "aiding and abetting" doctrine for "theft" was broader than that for the INA's generic counterpart. 549 U.S. at 189-90; *see also id.* at 195-98 (Appendices A-C). That survey showed that

40 states defined "aiding and abetting" consistently with California law. *Id.* at 190-93; *see also id.* at 196 (Appendix B). Accordingly, this Court held "generic theft" tracked that 40-state consensus. *Id.* at 190-91.

2. A multi-jurisdictional analysis is even more decisive here. Under federal law, the Model Penal Code, and the criminal laws of 43 states, the least of the acts criminalized under Cal. Penal Code § 261.5(c)—consensual sex between a 21-year-old and a partner just under 18—is entirely lawful. Furthermore, six of the seven remaining states exclude that conduct from their conceptions of "sexual abuse."

a. *Federal law.* 18 U.S.C. § 2243, which criminalizes "sexual abuse of a minor," contains the only definition of that phrase in the U.S. Code. That statute requires that the victim be under 16 years old and that the defendant be at least four years older. *Id.* § 2243(a).

The Sixth Circuit deemed consulting Section 2243 "neither compelled nor sensible," Pet. App. 13a, but it was wrong. The Sixth Circuit first noted that, in contrast to other "aggravated felonies" listed in the INA that cross-reference particular federal criminal statutes, "sexual abuse of a minor" does not cross-reference Section 2243. *Id.* 14a. But the lack of a cross-reference is unremarkable. Petitioner does not contend that "sexual abuse of a minor" in the INA must be defined exclusively according to the federal statute criminalizing that conduct. Rather, as with "murder," "rape," "burglary," "theft," and other crimes in the INA that lack such cross-references, *see* 8 U.S.C. § 1101(a)(43)(A), (G), petitioner contends only that insofar as "sexual abuse of a minor" establishes

a "generic crime," its parameters turn on the "sense in which the term is now used" under federal law, state law, and the Model Penal Code, *Taylor*, 495 U.S. at 598. Section 2243 is simply the most relevant federal touchstone for that analysis.[3]

The Sixth Circuit also pronounced Section 2243 an improper guidepost because it does not presently encompass sexual abuse of children under the age of 12. *See* Pet. App. 13a. But the categorical approach directs courts to consider the criminal law as it existed "at the time Congress enacted" the statute at issue. *Perrin*, 444 U.S. at 42; *see also* U.S. Reply Br. 6, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (No. 05-1629) ("The most relevant time" for surveying the landscape is when the aggravated felony was added to the INA. (quotation marks omitted)). And in the same legislation in which Congress added the phrase "sexual abuse of a minor" to the INA, it amended Section 2243 to encompass acts against children under the age of 12. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 121, 321, 110 Stat. 3009, 3009-31, 3009-627 (1996). The INA's reference to "sexual abuse of a

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[3] Should the Court conclude that "sexual abuse of a minor" is not a generic crime in the sense just described, then it should treat that statutory term as one for which Congress provided a readily apparent definition in Section 2243. That section's definition of the term (now supplemented, as explained just below, by 18 U.S.C. § 2241(c)) would dictate—just like a multi-jurisdictional analysis—that the least of the acts criminalized under Cal. Penal Code § 261.5(c) does not constitute "sexual abuse of a minor." *See* Amicus Br. of IDP and NIP.

minor" should therefore be construed to track the meaning of the "identical words" enacted that same day in Section 2243. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

It is true that Congress has since amended Section 2243 to cease its coverage of crimes against children under 12. But Congress did so for a reason having nothing to do with its conception of "sexual abuse of a minor": The coverage created a "redundancy." Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 301(b), 112 Stat. 2974, 2979. 18 U.S.C. § 2241(c) punishes (in the words of the same Congress that enacted the INA provision at issue here) "aggravated sexual abuse of a minor," Amber Hagerman Child Protection Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-31, 3009-31. And that statute covers sexual acts against children who have "not attained the age of 12 years." 18 U.S.C. § 2241(c). Sections 2243 and 2241 are part of a single whole, Chapter 109A, which "criminalizes a range of sexual-abuse offenses involving adults or minors and wards." *Lockhart v. United States*, 136 S. Ct. 958, 964 (2016) (emphasis omitted). Accordingly, there is no doubt that using Section 2243 as a guidepost here still enables convictions for sexual abuse of minors under 12 to fall within the INA's generic crime of "sexual abuse of a minor."[4]

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[4] There is nothing unusual about using a complementary statute, such as 18 U.S.C. § 2241(c), to punish sex with young children as a more serious offense. Many state criminal codes do that as well. *See* Pet. Reply 7 n.1 (collecting state statutes).

b. *The Model Penal Code.* Just like the U.S. Code, the Model Penal Code's relevant prohibition requires that the victim be under 16 and at least four years younger than the defendant. *See* Model Penal Code § 213.3(1)(a) (Am. Law Inst. 1962). Therefore, the least culpable conduct at issue here is perfectly lawful under the Model Penal Code—and certainly not any form of "abuse."

c. *State law.* Federal criminal law and the Model Penal Code are consistent with "the criminal codes of most States," *Taylor*, 495 U.S. at 598. Consensual sex between a 21-year-old and someone almost 18 is legal under the criminal laws of 43 states and the District of Columbia. Pet. App. 66a-67a (appendix with 50-state survey).[5]

In fact, even the number 43 understates the consensus among the states on the question presented. Six of the seven states that criminalize consensual sex between partners who are 21 years old and almost 18 reserve the term "sexual abuse"—like states in the majority—to describe transgressions different from the least culpable conduct at issue here. Specifically, six of the seven states define "sexual abuse" to encompass sexual activity involving persons younger than a certain age only where the offender holds a position of authority over the victim or the victim is younger than 16.

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[5] Colorado is inadvertently listed twice in the appendix to the petition for a writ of certiorari. It should be listed only in category two, which collects states in which consensual sex between a 21-year-old and a 17-year-old (but not necessarily a 16-year-old) is legal. *See* Pet. App. 66a.

Virginia, for example, considers a minor to be sexually "abused" only when his "parents" or someone else "responsible for his care" commit or facilitate the illegal sexual acts, Va. Code § 16.1-228.4, or an adult has contact with a minor under 15, *id.* § 18.2-67.4:2. Arizona and North Dakota similarly limit their definition of "sexual abuse" to sexual contact with children younger than 14 or 15, respectively. *See* Ariz. Rev. Stat. § 13-1417; N.D. Cent. Code § 12.1-20-03.1. California, Idaho, and Wisconsin limit their definition of "sexual abuse" to sex with someone who is under 16. Cal. Penal Code § 261.5(d) (cross-referenced in *id.* § 11165.1(a)); Idaho Code § 18-1506; Wis. Stat. § 948.02(2) (cross-referenced in *id.* § 971.37(1)). Lest there be any doubt that the least culpable conduct at issue here does not constitute "sexual abuse" in the eyes of California, the State has explicitly declared that it does *not* consider a 16-year-old who "voluntarily engages in sexual intercourse" to be a victim of "abuse." *In re Kyle F.*, 5 Cal. Rptr. 3d 190, 194 (Ct. App. 2003); *see also* Opinion No. 83-911, 67 Ops. Cal. Att'y Gen. 235 (June 1, 1984) (same).

All told, only *one* state characterizes consensual sex between someone almost 18 and a person just over three years older as "sexual abuse." *See* Or. Rev. Stat. § 163.415(1)(a)(B). 49 states do not. Given that the Court has held that agreements among 40 states (*Duenas-Alvarez*), 41 states (*Taylor*), and 42 states (*Perrin*) dictate the parameters of generic crimes, *see supra* at 15-17, the overwhelming consensus here should be conclusive.

3. Notwithstanding this Court's instruction to construe generic crimes according to multi-jurisdictional surveys, the Sixth Circuit and the BIA

declared that methodology inapplicable to this case. Neither reason the Sixth Circuit and the BIA gave for this evasion withstands scrutiny.

a. The Sixth Circuit first declined to follow the methodology laid out in *Taylor* on the ground that *Taylor* involved deriving a generic crime under "the Armed Career Criminal Act" (ACCA), 18 U.S.C. § 924(e), not the INA. Pet. App. 6a-7a. The Government did not defend this reasoning at the certiorari stage. And for good reason: The Court has made clear that the categorical approach operates the same way under the INA as it does under ACCA. Indeed, in *Duenas-Alvarez*, where this Court applied the categorical approach to the INA's "aggravated felony" provisions, it directly imported the multi-jurisdictional-survey approach from *Taylor* and its progeny. 549 U.S. at 186-87.

Ever since then, the Court has elucidated the categorical approach interchangeably in ACCA and INA cases. *See, e.g.*, *Mathis*, 136 S. Ct. at 2251 n.2 (explaining that the categorical approach is often used "outside the ACCA context—most prominently, in immigration cases"); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (using ACCA and INA case law to conduct a categorical analysis in an INA case); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (same) (using ACCA and INA case law to conduct a categorical analysis in an ACCA case); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (same as *Mellouli*).

b. The BIA asserted that there is no need to conduct a multi-jurisdictional survey where, as here, states define the crime at issue "in many different ways" and variations among the relevant statutes make it "difficult, if not impossible, to determine

whether a majority consensus" exists with respect to every aspect of the generic offense. Pet. App. 39a (quotation marks omitted). The Sixth Circuit accepted this reasoning, holding that the BIA permissibly construed "sexual abuse of a minor" according to a variety of non-criminal sources—most notably, 18 U.S.C. § 3509, which establishes various procedural rights for child witnesses. *See id.* 11a-12a, 29a-30a, 35a-36a. This reasoning is no more correct than the Sixth Circuit's assertion that *Taylor* applies only in ACCA cases.

i. This Court has clearly and repeatedly held that *Taylor*'s methodology applies even when states have divergent definitions of the crime at issue. Indeed, the whole purpose of the categorical approach is to derive a "uniform definition" when jurisdictions define a referenced crime in various ways. *Taylor*, 495 U.S. at 580, 592; *see also Moncrieffe*, 133 S. Ct. at 1684.

In *Taylor* itself, this Court noted that "[s]tates define burglary in many different ways." *Taylor*, 495 U.S. at 580. Yet the Court still looked to "the generic sense in which the term is now used in the criminal codes of *most* States," federal law, and the Model Penal Code. *Id.* at 598 (emphasis added).

The Court also faced varied state laws in *Duenas-Alvarez* and *Perrin*. Yet multi-jurisdictional surveys concerning particular elements were still decisive in those cases. *See supra* at 16-17; *see also United States v. De Jesus Ventura*, 565 F.3d 870, 876 (D.C. Cir. 2009) ("*Taylor* instructs us to determine the elements of kidnapping that are common to *most* states' definitions of that crime." (emphasis added)); *United States v. Palomino Garcia*, 606 F.3d 1317,

1331-34 (11th Cir. 2010) (same for "aggravated assault"). Regardless of whether jurisdictions' definitions are so varied that deducing a consensus on every element might be difficult, courts must examine whether a consensus exists as to the element(s) at issue. *See United States v. Rangel-Castaneda*, 709 F.3d 373, 380-81 (4th Cir. 2013) (Wilkinson, J.) (applying this approach to "sexual abuse of a minor").

ii. Even if it somehow were not already settled that multi-jurisdictional analyses dictate the parameters of generic crimes, this Court should still follow that method here instead of construing "sexual abuse of a minor," as the BIA did, according to procedural statutes such as Section 3509, civil case law, and decades-old periodicals.

For starters, the text of the INA directs courts to draw guidance from substantive criminal laws, rather than procedural or civil statutes. As this Court has explained, "the relevant statutory hook" in the INA's "aggravated felony" regime is the word "convicted." *Moncrieffe*, 133 S. Ct. at 1685 (quotation marks omitted) (referencing 8 U.S.C. § 1227(a)(2)(A)(iii)); *see also Chambers v. United States*, 555 U.S. 122, 125 (2009) (reasoning that ACCA's use of the word "felony" is key). The word "convicted" directs courts' attention to "criminal codes" to determine the aspects of generic crimes. *See Taylor*, 495 U.S. at 575, 598 & n.8.

This directive makes sense. Statutory terms can have particularized meanings when used to define substantive criminal offenses that are narrower than their meanings in other contexts. This Court has explained, for instance, that the word "willfully" is "a

word of many meanings whose construction is often dependent on the context in which it appears"—specifically, on whether it is being used to define a criminal offense or a civil-law concept. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-59 (2007) (quotation marks omitted); *see also, e.g., Beck v. Prupis*, 529 U.S. 494, 500-02 & n.6 (2000) (contrasting different meanings of "conspiracy" in criminal and civil contexts). Accordingly, when the INA uses words to identify a generic crime, the only sure way to accurately assess their meanings is to survey substantive criminal laws, not other sources.

Finally, using multi-jurisdictional surveys of substantive criminal laws serves the categorical approach's objectives of "promot[ing] efficiency, fairness, and predictability." *Mellouli*, 135 S. Ct. at 1987; *see also Moncrieffe*, 133 S. Ct. at 1692 n.11 (categorical approach should "ensure[] that all defendants . . . will be treated consistently, and thus predictably, under federal law"). Multi-jurisdictional surveys limit the relevant sources to a collection that is definite and knowable: federal and state substantive criminal laws and the Model Penal Code. This limited universe of materials enables noncitizens and lawyers objectively to discern the immigration consequences of criminal convictions. It also promotes uniformity and judicial restraint. A judge cannot cherry-pick sources when a fifty-state survey is required.

Multi-jurisdictional analyses are also workable as a practical matter. Even apart from the INA, ACCA, and the Travel Act, this Court has employed multi-jurisdictional surveys across a range of contexts. *See, e.g., Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S.

393, 410-11 (2003) (holding that "extortion" in the context of the Racketeer Influenced and Corrupt Organizations Act (RICO) tracks how "a majority of States" define the offense); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (analyzing whether felony-murder constitutes "cruel and unusual punishment" under the Eighth Amendment). Multi-jurisdictional surveys of criminal laws are typically readily available for such uses. In its decision addressing the question presented here, for example, the Ninth Circuit cited two pre-existing 50-state surveys compiling statutory rape laws. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1153 (9th Cir. 2008) (en banc) (citing The Lewin Grp., *Statutory Rape: A Guide to State Laws and Reporting Requirements* (2004) (prepared for U.S. Dep't of Health & Human Servs.); Conn. Office of Legislative Research, *Statutory Rape Laws by State* (2003)).[6]

By contrast, the Sixth Circuit's and BIA's approach of looking to procedural statutes, civil-law cases, and policy-based periodicals is unpredictable and unwieldy. One need look no further than this case to see why this is so.

Start with the notion of consulting statutes, such as Section 3509, that do things other than define

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[6] Even if an on-point compilation does not already exist, multiple legal research tools—such as Lexis, Westlaw, and HeinOnline—provide databases of 50-state surveys of criminal laws. Moreover, the Government—as the party seeking deportation in "aggravated felony" cases like this one—has ample resources to marshal the relevant information. *See, e.g.*, U.S. Br. in *Duenas-Alvarez*, 549 U.S. 183 (No. 05-1629) (attaching appendix with 50-state survey).

crimes. Once one looks in the U.S. Code beyond the two statutes that criminalize sexual abuse of a minor—Sections 2241 and 2243—one discovers there are at least 47 other federal statutes that address "sexual abuse" of "minors" or (as in Section 3509) "children."[7] These statutes reside in titles ranging from Education (Title 20) to Public Health and Welfare (Title 42).

It is a mystery why Section 3509 provides better guidance on the question presented than some of these other provisions. Section 3509 establishes "[c]hild victims' and child witnesses' rights" in court—rights such as the ability to testify via closed-circuit television, the right to protective orders concealing their identity, and access to guardians ad litem. *See* 18 U.S.C. § 3509(d)(3), (b)(1), (h). It defines the phrase "sexual abuse" but offers no explicit guidance on whether or when the type of conduct at issue here qualifies. *See id.* § 3509(a)(8). To provide just one example of another federal statute that would seem more precise and instructive: 42 U.S.C. § 5106g(4)(B) defines "sexual abuse" (for purposes of administering various grants and programs to fight such abuse) in a manner making clear that "statutory rape" constitutes "sexual abuse" only "in cases of caretaker or inter-familial relationships."

The shortcomings of the Sixth Circuit's and BIA's freewheeling approach multiply when one considers

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[7] This figure derives from a Westlaw search of the U.S. Code Unannotated for "'sex! abuse' /s child! or minor." This figure leaves aside dozens more search results in the U.S. Sentencing Guidelines and the Code of Federal Regulations.

the challenges of using civil case law to formulate the parameters of generic crimes. The BIA claimed to find support for treating statutes that cover consensual sex between a 21-year-old and someone almost 18 as criminalizing "sexual abuse of a minor" in *Bellotti v. Baird*, 443 U.S. 622 (1979), a case involving minors' access to abortion. *See* Pet. App. 35a. That decision assumed, per the state law at issue, that a "minor" is someone under 18. *Bellotti*, 443 U.S. at 625 (plurality opinion). But the opinion says *nothing* about whether consensual sex with someone under 18 constitutes "abuse." To the extent the opinion signals anything at all about consensual sex, it suggests that women under 18 sometimes have "sufficient maturity" to make such important decisions. *Id.* at 650 (plurality opinion). More fundamentally, though, the whole exercise of seeking guidance from a civil case about abortion—or from similarly unrelated case law—concerning the parameters of a generic crime is a fool's errand.

When one imagines holding noncitizens—or even immigration lawyers—also responsible for gleaning clues from periodicals and other secondary sources, the BIA's alternative to conducting multi-jurisdictional analyses becomes truly impossible to accept. The BIA here referenced an article in a family planning journal discussing whether "female adolescents who experienced their first voluntary sexual intercourse with an older partner" are at greater risk for contracting HIV. Kim S. Miller et al., *Sexual Initiation with Older Male Partners and Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 212 (1997), *cited in* Pet. App. 35a-36a. If this 20-year-old study is relevant here, then *thousands* of other studies must

be too—studies that might suggest widely disparate notions of what qualifies as "sexual abuse of a minor." *See, e.g.*, Theresa E. Senn et al., *Characteristics of Sexual Abuse in Childhood and Adolescence Influence Sexual Risk Behavior in Adulthood*, 36 Archives Sexual Behav. 637, 639 (2007) (discussing the concept of "childhood/adolescent sexual abuse," which is defined in the context of consensual sexual activity as a person's having sex "before age 13 with someone 5 or more years older" or "between ages 13 and 16 with someone 10 or more years older").

No sensible legal methodology would permit or require judges to scan vast archives of social science research and other secondary sources to find whatever random article might support a certain conception of a generic criminal offense. The only predictable, objective, and fair way to employ the categorical approach is to stick to statutes defining substantive crimes.

B. Other Tools of Statutory Interpretation Confirm that Consensual Sex Between a 21-Year-Old and Someone Almost 18 Does Not Constitute "Sexual Abuse of a Minor."

For all of the reasons just stated, a multi-jurisdictional analysis dictates that the generic offense of "sexual abuse of a minor" excludes the least culpable conduct encompassed within Cal. Penal Code § 261.5(c). But even if this Court looks beyond that precise methodology, the text and structure of the INA confirm that consensual sex between a 21-year-old and someone almost 18 does not constitute "sexual abuse of a minor."

1. Three aspects of the text of the INA reinforce that consensual sex between partners who are 21 and almost 18 does not constitute "sexual abuse of a minor."

a. The "ordinary, commonsense meaning," *United States v. Johnson*, 529 U.S. 53, 57 (2000), of the term "sexual abuse" in Section 1101(a)(43)(A) excludes consensual sex between a 21-year-old and someone almost 18. Such individuals are often in the same peer groups. For instance, college campuses around the country are filled with individuals across this age range—often occupying overlapping social circles from college choirs to campus newspapers. Not even the most aggressive codes of conduct would characterize a consensual sexual relationship between such individuals as "sexual abuse." Nor would a typical American call what happened here—consensual sex between a boyfriend and girlfriend, both at least 16 and only about four years apart—"sexual abuse."

This is more than just a labeling argument. States with expansive statutory rape statutes like Cal. Penal Code § 261.5(c) do not themselves see such provisions as dealing with sexual abuse. Instead, these laws, as the State of California has explained, are designed to serve the social welfare mission of "prevent[ing] illegitimate teenage pregnancy by providing an additional deterrent." *Michael M. v. Superior Court*, 450 U.S. 464, 475 (1981) (plurality opinion); *see also People v. Magpuso*, 28 Cal. Rptr. 2d 206, 209 (Ct. App. 1994) ("The public policy supporting section 261.5 is a societal interest in preventing unwanted teenage pregnancy."). Different state laws—such as those covering sex with children

under 16 or offenders holding positions of authority over victims—are designed to punish the "amoral and unscrupulous" conduct commonly understood as abusive. *Magpuso*, 28 Cal. Rptr. 2d at 209; *see supra* at 21 (other states' laws).

b. Section 1101(a)(43)(A)'s pairing of "sexual abuse of a minor" with two other violent offenses—"murder" and "rape"—buttresses the conclusion that the generic crime is meant to cover conduct more severe than the least culpable conduct falling within Cal. Penal Code § 261.5(c). A standard interpretive principle is that a "word is known by the company it keeps (the doctrine of *noscitur a sociis*)." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). This canon helps to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

This principle is telling here. Murder is so horrific that it is sometimes punishable by death. And this Court has recognized that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (citation omitted). That "sexual abuse of a minor" is the only other generic crime in the statutory clause with these two extreme offenses imbues the crime with "more precise content," *United States v. Williams*, 553 U.S. 285, 294 (2007), and indicates that it is likewise meant to cover only truly abhorrent acts. Consensual sex between a 21-year-old and someone almost 18 does not rise to that level.

The legislative history of this particular grouping of offenses underscores that reading "sexual abuse of

a minor" to cover the most expansive and technical restrictions on who may engage in consensual sex would contravene Congress's conception of the offenses as similarly egregious aggravated felonies. Prior to 1994, the INA's "aggravated felony" list appeared in one unbroken paragraph starting with "murder." 8 U.S.C. § 1101(a)(43) (1988). A 1994 amendment expanded that list and divided it into separate clauses. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22. "Murder" appeared first and alone. *See id.* When the Illegal Immigration Reform and Immigrant Responsibility Act added "rape" and "sexual abuse of a minor" in 1996, these offenses and no others were placed next to murder. *See* Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (1996). That Congress elected to place "sexual abuse of a minor" in an exclusive group with "murder" and "rape" as it expanded the INA's list of aggravated felonies indicates it conceived of these above all others in the list as the most serious.

c. Finally, this Court has stressed the need to be "very wary" of construing the INA's term "aggravated felony" in a manner that "the English language tells us not to expect." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (quotation marks omitted); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (same with respect to "crime of violence"). In *Moncrieffe*, for example, the Court deemed it a "fundamental flaw" for the Government to argue that "even an undisputed misdemeanor [under federal law was] an aggravated felony." 133 S. Ct. at 1689. And in *Carachuri-Rosendo*, the Court reasoned that even though the U.S. Code categorizes "simple drug possession" as a felony, it would have been

"unorthodox" to treat it—as the Government urged—as an "*aggravated* felony." 560 U.S. at 574 (quotation marks omitted). An "aggravated" felony, this Court explained, is one "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Id.* (quotation marks omitted).

The Government's position here is even more outlandish than in either of those cases. The least of the acts covered by Cal. Penal Code § 261.5(c) is *not even a crime* under federal criminal law—not to mention in the vast majority of states. *See supra* at 17-21. And even among the seven states that criminalize the conduct, the majority demand it be charged as a misdemeanor.[8] Surely conduct that is lawful in nearly all jurisdictions and a misdemeanor in most others cannot be an "aggravated felony."

2. Construing "sexual abuse of a minor" to exclude the least culpable acts under Cal. Penal Code § 261.5(c) comports with the structure of the INA. As in *Moncrieffe*, *see* 133 S. Ct. at 1692-93, this Court need not stretch the meaning of the aggravated felony at issue to ensure that serious offenders are subject to deportation. Noncitizens who are convicted of serious sex offenses against minors—including in California—will still be subject to this consequence.

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[8] *See* N.D. Cent. Code § 12.1-20-05.1; Or. Rev. Stat. § 163.415(2); Va. Code § 18.2-371(ii); Wis. Stat. § 948.09. Only Arizona and Idaho categorize the crime as a felony, *see* Ariz. Rev. Stat. § 13-1405; Idaho Code § 18-6101(2), and California allows it to be charged as a felony (as it was here) at the prosecutor's discretion, *see* Cal. Penal Code § 261.5(c).

First and foremost, construing the generic crime of "sexual abuse of a minor" to exclude consensual sex between a 21-year-old and someone almost 18 still leaves the generic crime covering a "broad array of state-law convictions," Pet. App. 14a. Even the seven states with statutes criminalizing that conduct have separate statutes criminalizing sexual activity with children under 16 or 15. In California, for instance, a statute right next to Cal. Penal Code § 261.5(c) makes it a crime—almost exactly like 18 U.S.C. § 2243—for "[a]ny person 21 years of age or older [to] engage[] in an act of unlawful sexual intercourse with a minor who is under 16 years of age." Cal. Penal Code § 261.5(d).[9] Convictions under these statutes may still serve as a basis for mandatory deportation.

And the "sexual abuse of a minor" provision is not the only subsection of the INA that subjects noncitizens who commit sex offenses against children to mandatory deportation. "Child pornography" and "trafficking in persons" are also aggravated felonies. 8 U.S.C. § 1101(a)(43)(I), (K). Noncitizens convicted of state-law offenses falling within these denoted offenses are subject to mandatory removal.

Lastly, even for those convicted of sex offenses that do not constitute aggravated felonies, "[e]scaping aggravated felony treatment does not mean escaping deportation." *Moncrieffe*, 133 S. Ct. at 1692. "It means only avoiding mandatory removal." *Id.* Such

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[9] *See also* Ariz. Rev. Stat. §§ 13-1410, 13-1404; Idaho Code § 18-1506(1)(a); N.D. Cent. Code § 12.1-20-03.1; Or. Rev. Stat. § 163.355; Va. Code §§ 18.2-67.4:2, 18.2-61; Wis. Stat. 948.02(2).

individuals may still be subject to the deportability grounds of the INA if their offenses constitute "crime[s] involving moral turpitude" or "child abuse." 8 U.S.C. § 1227(a)(2)(A)(i), (E)(i); *see also, e.g.*, *Rohit v. Holder*, 670 F.3d 1085, 1089 (9th Cir. 2012) (holding solicitation is a "crime of moral turpitude"); *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 517 (B.I.A. 2008) (holding "child abuse" includes sexual abuse or exploitation).

II. The BIA's Determination to the Contrary Is Not Entitled to *Chevron* Deference.

Taking its cue from the Government, *see* U.S. CA6 Br. 15-16, the Sixth Circuit declared the phrase "sexual abuse of a minor" to be "ambiguous," Pet. App. 11a. In response to this ostensible ambiguity, the Sixth Circuit invoked *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the BIA's view in this case that "sexual abuse of a minor" encompasses convictions under Cal. Penal Code § 261.5(c). Pet. App. 11a-15a. But the Sixth Circuit was wrong to deem the INA ambiguous concerning the question presented. And even if ambiguity somehow existed, the BIA's view would not be entitled to *Chevron* deference because its construction of the INA is unreasonable.

A. No Ambiguity Within the Meaning of *Chevron* Exists Here.

1. The Sixth Circuit deemed Section 1101(a)(43)(A) ambiguous for *Chevron* purposes solely because "[n]owhere in the statute did Congress specify the definitions of 'sexual abuse' or 'minor.'" Pet. App. 11a. In other words, the Sixth Circuit used the textual imprecision that ordinarily triggers the

categorical approach as justification for skipping straight to *Chevron* deference.

This reasoning ignores the rule that a statute cannot be pronounced ambiguous for *Chevron* purposes until all "traditional tools of statutory construction" have been exhausted. *Chevron*, 467 U.S. at 843 n.9; *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context."). Under this basic precept of *Chevron*, "[t]he lack of a statutory definition of a word does not necessarily render" a statute "ambiguous." *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006). "[A] statute may foreclose an agency's preferred interpretation despite . . . textual ambiguities" if another traditional tool of statutory interpretation "makes clear what its text leaves opaque." *Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009).

Such is the case with respect to the categorical approach as an interpretive tool. The very function of the categorical approach in INA cases is to resolve any "[a]mbiguity" that resides in deportation provisions—and to "err on the side of underinclusiveness." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1687, 1693 (2013). It thus comes as no surprise that even though the Government has sometimes asked this Court to defer to the BIA's assessments of the parameters of generic crimes, this Court has never done so. *See, e.g.*, *id.* at 1684-89 (determining the parameters of an aggravated felony without reference to *Chevron*); *Luna Torres v. Lynch*, 136 S.

Ct. 1619 (2016) (same); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (same).[10]

At the very least, the categorical approach resolves any ambiguity *in this case*. For the reasons stated in Part I, the categorical approach yields a pellucidly clear answer to the question whether the generic definition of "sexual abuse of a minor" encompasses the least culpable conduct under Cal. Penal Code § 261.5(c). The multi-jurisdictional survey here reveals that the federal government, the Model Penal Code, and 43 states deem this conduct perfectly legal; 49 states do not think it rises to the level of "sexual abuse." *See supra* at 17, 20-21. And to the extent applicable, other textual and structural analyses reinforce the sensibility of this consensus. This overwhelming agreement is even more decisive than in *Perrin v. United States*, 444 U.S. 37 (1979), where the Court held that no "genuine ambiguity" remained because federal legislation, the Model Penal Code, and 42 states agreed on the element of the crime at issue. *Id.* at 45 & n.11, 49 n.13.

2. Even if the categorical approach did not yield a definitive answer to the question presented, this Court would still need to exhaust traditional tiebreaking canons before declaring the statute "ambiguous" within the meaning of *Chevron*. In

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[10] As the Sixth Circuit noted, this Court has deferred to the BIA's interpretations of certain immigration laws. Pet. App. 4a-5a (citing *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *Negusie v. Holder*, 555 U.S. 511, 516-17 (2009); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999)). But none of those cases involved the categorical approach.

INS v. St. Cyr, 533 U.S. 289 (2001), for instance, this Court had to decide whether certain statutory changes to the INA applied retroactively. Because the statutory text provided no clear answer to that question, the Government urged the Court to "extend deference under *Chevron* to the BIA's interpretation" that the new provisions applied retroactively. *Id.* at 320 n.45 (citation omitted). The Court rejected the argument, explaining that when, as in that case, a traditional presumption dictates a particular reading of seemingly "ambiguous" text, "there is, for *Chevron* purposes, no ambiguity in [the] statute for an agency to resolve." *Id.*[11]

So too here. Even if ambiguity somehow remained after employing the categorical approach, two traditional tiebreaking rules of statutory construction would independently foreclose deferring to the BIA's construction of "sexual abuse of a minor."

a. Because mandatory deportation follows from deeming a conviction to constitute "sexual abuse of a minor" under the INA, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" applies here. *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012) (noting the Court has

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[11] For other examples of applying presumptions and related tiebreaking canons to resolve ambiguities without turning to *Chevron*, see *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (presumption against preemption); *Alexander v. Sandoval*, 532 U.S. 275, 290-91 (2001) (presumption against implied rights of action); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (constitutional avoidance).

long "construed ambiguities in deportation statutes in the alien's favor"); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.").

This "accepted principle[] of statutory construction," *Costello v. INS*, 376 U.S. 120, 128 (1964), stems from the nature of deportation. This Court has explained time and again that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)); *see also Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010) (recognizing "the seriousness of deportation" and the "concomitant impact of deportation on families living lawfully in this country"). Here, for example, Esquivel-Quintana—who has called the United States his home since he was 12 years old—faces permanent separation from his parents and siblings, all of whom reside lawfully in the United States. Deporting individuals in this situation can strip them of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Thus, courts should "not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10.

This presumption against construing statutes to trigger deportation also helps ensure noncitizens understand when guilty pleas or other criminal convictions might subject them to removal. As this Court recently observed, it is of "great importance" that noncitizens know when criminal convictions

might trigger "exile from this country and separation from their families." *Padilla*, 559 U.S. at 370; *accord Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). Indeed, this imperative "has never been more important" as changes in immigration law have eliminated certain procedural protections—including judicial discretion to prevent removal—for particular classes of offenses. *Padilla*, 559 U.S. at 360-64.

Accordingly, if any ambiguities remained here after applying the categorical approach, they would need to be resolved in petitioner's favor. The Government has never claimed that the phrase "sexual abuse of a minor" puts people like Esquivel-Quintana clearly on notice that convictions under statutes such as Cal. Penal Code § 261.5(c) would subject them to mandatory deportation. To the contrary, the Government told the Sixth Circuit—and has previously told this Court as well—that "[t]he term 'sexual abuse of a minor' is an ambiguous term." U.S. CA6 Br. 9; *see also* BIO 10, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745) (same). (Worse yet, Ninth Circuit law at the time Esquivel-Quintana pleaded guilty to violating Cal. Penal Code § 261.5(c) advised him that the offense did *not* constitute "sexual abuse of a minor" under the INA. *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 (9th Cir. 2008) (en banc).) Even if the Government were correct, therefore, that Section 1101(a)(43)(A) is ambiguous, this Court would still be "constrained" to resolve the uncertainty in favor of noncitizens such as Esquivel-Quintana. *Costello*, 376 U.S. at 128.

b. The meaning of "sexual abuse of a minor" in the INA determines criminal liability as well as

immigration consequences. *See* Pet. App. 7a. This is because "aggravated felony" convictions serve as predicates for federal criminal prosecutions and sentencing enhancements. For instance, noncitizens convicted of illegally reentering the country may generally receive two-year prison sentences, but those previously convicted of an "aggravated felony" under the INA who reenter illegally are subject to 20-year sentences. 8 U.S.C. § 1326(b)(2); *United States v. Rangel-Castaneda*, 709 F.3d 373, 380-81 (4th Cir. 2013). Noncitizens convicted of "aggravated felonies" are also subject to heightened criminal sanctions if they disobey orders of removal, *see* 8 U.S.C. § 1253(a)(1), as are individuals who help "aggravated felon[s]" illegally enter the country, *id.* § 1327.

In light of these criminal applications, any ambiguity in Section 1101(a)(43)(A) would also trigger the criminal rule of lenity—another "time-honored interpretive guideline," *Crandon v. United States*, 494 U.S. 152, 158 (1990) (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Indeed, two of this Court's Justices have already strongly suggested that when dealing with "hybrid" civil-criminal statutes, the criminal rule of lenity forecloses resorting to *Chevron* deference. *See Whitman v. United States*, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). Judge Sutton reached that conclusion here as well. Pet. App. 18a-19a (Sutton, J., concurring in part and dissenting in part).

i. A simple three-step syllogism establishes that the criminal rule of lenity applies to the construction of hybrid statutes such as the INA's "sexual abuse of a minor" provision.

First, where a criminal statute has ambiguous terms, the rule of lenity requires courts to resolve the ambiguity in favor of defendants. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 410 (2010); *Perrin*, 444 U.S. at 49 n.13. This rule ensures "that there is fair warning of the boundaries of criminal conduct." *Crandon*, 494 U.S. at 158. It also guarantees "that legislatures, not courts" or the executive branch, "define criminal liability." *Id.*; *see also Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

Second, statutes are not "chameleon[s]." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). That is, the meaning of a hybrid statute cannot be "subject to change" depending on the context in which it is being applied. *Id.*; *see also, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . . ."); *FCC v. ABC*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.").

Third, because ambiguities in criminal statutes must be construed against the Government and a hybrid statute must mean the same thing in both its civil and criminal applications, the criminal construction—as the "lowest common denominator"—"must govern." *Martinez*, 543 U.S. at 380; *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in the judgment) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws.").

An agency's expansive construction is "not relevant at all." *Abramski*, 134 S. Ct. at 2274. Put another way, "the one-interpretation rule means that," in the context of an "aggravated felony provision" with immigration and criminal applications, "the criminal-law construction of the statute (with the rule of lenity) prevails over [any alternative BIA] construction of it (without the rule of lenity)." Pet. App. 18a (Sutton, J., concurring in part and dissenting in part). Any other outcome would "collide with the norm that legislatures, not executive officers, define crimes." *Whitman*, 135 S. Ct. at 353 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari).

ii. The Sixth Circuit's majority agreed there are "compelling reasons" for holding that the rule of lenity forecloses resorting to *Chevron* when interpreting hybrid statutes. Pet. App. 8a. Indeed, the majority explained that "deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers." *Id.* The majority nevertheless held that the BIA's interpretation of Section 1101(a)(43)(A) is eligible for *Chevron* deference because it believed *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), requires this result. Pet. App. 9a-10a.

The majority's allegiance to *Babbitt* was unwarranted. The *Babbitt* language the Sixth Circuit cited appeared in a "drive-by" footnote that "deserves little weight." *Whitman*, 135 S. Ct. at 354 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). In the footnote, this Court rejected the argument that "the rule of lenity should provide the

standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt*, 515 U.S. at 704 n.18. But, as Members of this Court have pointed out, this ruling "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings" and forecloses *Chevron* deference. *Whitman*, 135 S. Ct. at 353-54 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari) (citing *Leocal*, 543 U.S. at 11 n.8; *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion)); *see also Moncrieffe*, 133 S. Ct. at 1693; *Kasten v. Saint-Gobain Performance Plastic Corp.*, 563 U.S. 1, 16 (2011).

At any rate, the *Babbitt* footnote is expressly limited to a context far removed from the one at issue here. *Babbitt* involved a declaratory judgment action claiming that a 20-year-old regulation implementing a civil provision of the Endangered Species Act was facially invalid. *Babbitt*, 515 U.S. at 704 n.18. Because the regulation gave ample prospective notice of the Act's reach, this Court stressed in the relevant footnote that affording *Chevron* deference to it did not raise any "fair warning" concern. *Id.* Nor did *Chevron* deference contravene the separation of powers. Congress had made it a crime to violate the regulation, *see* 16 U.S.C. § 1540(b)(1), so the legislature, not the agency, defined the criminal conduct.

Here, by contrast, the agency's view of the statute at issue stems from evolving "case-by-case adjudication," with the specific decision here dating

back just to 2015. Pet. App. 15a. Deferring to this 2015 decision (not to mention future elaborations of the BIA's views) would leave criminal defendants prosecuted for acts committed prior to 2015 with the sort of "inadequate notice of potential [criminal] liability" that *Babbitt* itself suggested would "offend the rule of lenity." 515 U.S. at 704 n.18.

Furthermore, *Chevron* deference in this case would violate the separation of powers. Even if, as in *Babbitt*, "Congress may make it a crime to violate a regulation," it would be "quite a different matter" for an agency's construction of a statute to determine the scope of criminal liability, as here, in the absence of such a delegation. *Whitman*, 135 S. Ct. at 353 (Scalia, J., joined by Thomas, J., respecting the denial of certiorari). Doing so would transgress the fundamental rule that "criminal laws are for courts, not for the Government, to construe." *Abramski*, 134 S. Ct. at 2274.

B. Even if There Were Ambiguity Triggering *Chevron*, the BIA's Construction Would Still Not Warrant Deference Because It Is Unreasonable.

Even if the BIA's adjudicatory decisions applying INA Section 1101(a)(43)(A) were eligible for *Chevron* deference, its construction of the statute here would still not warrant deference because it is not "a reasonable construction." *Chevron*, 467 U.S. at 840. The BIA committed three basic legal errors in reaching its conclusion that convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor."

1. The BIA inverted the categorical approach in exactly the way this Court warned against in

Moncrieffe. Under the categorical approach, an adjudicator "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether *even those acts* are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (alterations in original) (emphasis added) (quotation marks omitted) . Despite that directive, in *Moncrieffe* the Government complained that narrowly construing the INA's reference to "drug trafficking" would allow some offenders unfairly to "avoid 'aggravated felony' determinations" because many are convicted under state laws covering wide ranges of conduct, some of which is serious. *Id.* at 1692-93. The Court responded that the Government's "objection to that underinclusive result [was] little more than an attack on the categorical approach itself." *Id.*; *see also Mathis v. United States*, 136 S. Ct. 2243, 2251, 2257 (2016) (admonishing that "[f]or more than 25 years," and "in no uncertain terms," this Court has made clear that a state crime does not satisfy the categorical approach "if its elements are broader than those of a listed generic offense").

Here, the BIA made the same legal error. Despite reciting the rule that tethers analysis under the categorical approach exclusively to the least culpable conduct, *see* Pet. App. 32a, the BIA noted that Cal. Penal Code § 261.5(c) would cover "sexual intercourse between a 16-year-old high school student and his or her school teacher," *id.* 34a n.4. With this conduct in mind, the BIA declared it was "not prepared to hold that a 16- or 17-year-old categorically cannot be the victim of sexual abuse." *Id.* 34a. This reasoning turns the categorical approach on its head: It holds that a state statute falls within a generic crime based on an

example of the *worst* conduct the statute could cover, instead of focusing on "the *least* of th[e] acts criminalized," *Moncrieffe*, 133 S. Ct. at 1684 (emphasis added) (quotation marks omitted).

2. The BIA incorrectly sought guidance from a procedural statute and non-criminal sources to determine elements of the generic definition of "sexual abuse of a minor." As explained above, the categorical approach requires adjudicators to confine themselves to substantive criminal laws when seeking guidance concerning the parameters of generic crimes. *See supra* at 23-26. And those sources demonstrate here that Cal. Penal Code § 261.5(c) encompasses conduct beyond the generic crime of sexual abuse of a minor. *See supra* at 17-21.

3. Even if Section 1101(a)(43)(A) remained genuinely ambiguous after applying the categorical approach, the BIA should have resolved that ambiguity by applying either the presumption that deportation statutes should be construed narrowly or the criminal rule of lenity. *See supra* at 37-45. The BIA's failure to do so renders its holding here unreasonable. *See Okeke v. Gonzales*, 407 F.3d 585, 593-97 (3d Cir. 2005) (Ambro, J., concurring) (finding the BIA's interpretation to be unreasonable in part because it failed to resolve ambiguities in a deportation statute in favor of the noncitizen); *Rosario v. INS*, 962 F.2d 220, 225 (2d Cir. 1992) (concluding that "the INS' interpretation is unreasonable" because it contravened "the principle that in light of the harshness of deportation, ambiguous deportation provisions should be construed in favor of the alien.").

The BIA, in short, should at least have to abide by the same fair-notice principles that courts and Congress do. And those principles render it impermissible to hold that conduct that is legal under federal law, the Model Penal Code, and the laws of the vast majority of states constitutes an "aggravated felony" under the INA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Board of Immigration Appeals permissibly concluded that petitioner's conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator," in violation of California Penal Code § 261.5(c) (West 2009), was a conviction for "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A).

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Black's Law Dictionary (6th ed. 1990) 16, 18, 19, 38, 55
Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669 (2011)..... 2, 14

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H.R. Rep. No. 828, 104th Cong., 2d Sess. (1996) 17
Wayne R. LaFave, *Criminal Law* (5th ed. 2010) 15
Kim S. Miller et al., *Sexual Initiation with Older Male Partners And Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. (1997) 39, 40
Model Penal Code § 213.3(1)(a) (1985) 32
Model Penal Code & Commentaries § 213.3 cmt. 2 (1980) 33
Office of Immigration Statistics, Department of Homeland Security, *Annual Flow Report* (Dec. 2016), https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf 47
Office of Justice Programs, Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics*, http://www.bjs.gov/fjsrc/tsec.cfm (last visited Jan. 17, 2017) 47
67 Op. Cal. Att'y Gen. 235 (June 1, 1984) 31
Oxford English Dictionary (2d ed. 1989) 16
U.S. Census Bureau, *Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016 (NST-EST2016-01)* (Dec. 2016), http://www2.census.gov/programssurveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx 22
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JUAN ESQUIVEL-QUINTANA, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 810 F.3d 1019. The decision of the Board of Immigration Appeals (Pet. App. 27a-41a) is reported at 26 I. & N. Dec. 469. The decision of the immigration judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2016. A petition for rehearing was denied on April 12, 2016 (Pet. App. 42a). The petition for a writ of certiorari was filed on July 11, 2016. The petition was granted on October 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 10a-34a.

STATEMENT

1. "The assessment of criminal convictions has been a necessary feature of the federal immigration system for over a century." Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1689 (2011) (Das). In 1891, Congress first mandated the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084. Since that time, Congress has on multiple occasions added to the list of convictions that subject an alien not only to exclusion, but also to deportation or other immigration consequences. See Das 1672 & n.9, 1688.

In its present form, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides numerous grounds for removal of aliens whose continued presence Congress has deemed contrary to public safety and welfare, including conviction of offenses falling within various specified categories. 8 U.S.C. 1227(a)(2). As relevant here, the INA renders deportable an alien who has been convicted of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Such an alien is also ineligible for certain forms of discretionary relief from removal, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1] The INA defines what "[t]he term 'aggravated felony' means" by identifying covered offenses "whether [committed] in violation of

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[1] An aggravated felony conviction does not categorically disqualify an alien from obtaining certain other forms of relief. See U.S. Br. at 2 n.1, *Torres* v. *Lynch*, 136 S. Ct. 1619 (No. 14-1096).

Federal or State law." 8 U.S.C. 1101(a)(43). The provision at issue here, Section 1101(a)(43)(A), includes "murder, rape, or sexual abuse of a minor." The INA does not further define "sexual abuse of a minor."

2. In 2000, petitioner, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident. Pet. App. 28a. In 2009, he was charged with two felony counts of unlawful sexual intercourse with a minor in violation of California Penal Code § 261.5(c).[2] See Administrative Record (A.R.) 214-215. That provision makes it unlawful for a person to engage in sexual intercourse with a minor who is not the perpetrator's spouse and "is more than three years younger than the perpetrator." See Cal. Penal Code § 261.5(a) ("'minor' is a person under the age of 18 years"). Petitioner pleaded no contest to one felony count and was sentenced to 90 days in jail and five years of probation. Pet. App. 28a; see A.R. 209. The offense conduct spanned a five-month period in which the victim was 16 years old and petitioner was 20 or 21 years old. A.R. 209, 214.

a. In 2013, the Department of Homeland Security served petitioner with a Notice to Appear, charging that petitioner was removable because his conviction for unlawful sexual intercourse with a minor was an aggravated felony. A.R. 281-282; see Pet. App. 3a. Petitioner contested the charge of removability, arguing that his conviction did not constitute "sexual abuse of a minor." A.R. 216-225. An immigration judge rejected petitioner's argument and ordered him removed. A.R. 150-158.

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[2] Unless otherwise noted, all references to state statutes are to the version currently in effect.

b. In a published, precedential decision, the Board of Immigration Appeals (BIA or Board) dismissed petitioner's appeal. Pet. App. 27a-41a.

At the outset, the Board noted that two of its precedents helped shed light on the "ordinary meaning" of "sexual abuse of a minor." Pet. App. 29a. In *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1999), the Board had found "useful guidance" for construing "sexual abuse" in a federal provision that defined the term to mean "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." Pet. App. 30a (quoting 18 U.S.C. 3509(a)(8)). And in *In re V-F-D-*, 23 I. & N. Dec. 859 (2006), the Board had held that "a victim of sexual abuse who is under the age of 18 is a 'minor'" as that term is commonly understood. Pet. App. 30a. In petitioner's case, the Board stated, its task was to "expand upon these decisions and consider whether a violation of a statute that involves unlawful sexual intercourse and presumes a lack of consent based on the age of the victim is 'sexual abuse of a minor.'" *Ibid.*

For several reasons, the Board determined that it is. First, the Board explained that such offenses reflect the understanding that "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity." Pet. App. 35a (citation omitted). Among other things, "minors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Ibid.*

(brackets omitted) (quoting *Gattem* v. *Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005)). That "risk of coercion," the Board observed, "is particularly great when the victim is not in the same peer group" as the perpetrator. *Id.* at 36a. And the Board determined that "having an age differential of 'more than three years' helps ensure that the victim and the perpetrator are not in the same peer group." *Ibid.*; see *ibid.* (citing study "classifying a woman's partner as not peer-aged if he is 3 or more years older because of the likelihood that they are in different school settings or, if in the same school, have a different status, such as freshman and senior").

The Board accordingly concluded that statutory-rape crimes may, under certain circumstances, involve "conduct that constitutes 'sexual abuse' as that term is commonly used." Pet. App. 37a. In particular, for "offenses involving older adolescents"—such as offenses involving intercourse with 16- or 17-year-old victims—"the key consideration" is whether the crime involved "a meaningful age differential" between the perpetrator and the victim. *Id.* at 36a-37a. Such an age differential, the Board explained, helps distinguish "sexual acts that are 'abusive'" from those "that are not 'abusive' because they occur between high school peers who are separated in age by, for example, only 2 years." *Id.* at 37a. Thus, the Board determined, a statutory-rape offense involving intercourse with a 16- or 17-year old "categorically constitut[es] sexual 'abuse'" only where the statute of conviction requires at least a three-year difference between the victim's age and the perpetrator's. *Ibid.* That definition, the Board reasoned, accords with Congress's intent "to remove aliens who are sexually abusive toward children," while also

ensuring that aliens are not found to be removable based on "nonabusive consensual intercourse between older adolescent peers." *Id.* at 38a (citation omitted).

The Board recognized that its articulation of a definition was necessarily "limited" by the task in which that definition would be applied: Under the "categorical approach," any definition the Board adopted would be applied to the statutory elements of particular state offenses without regard to "the actual age of the victim, the age differential between the parties, or any other facts, even if they are undisputed in the judicially recognized documents that underlie the conviction." Pet. App. 38a. The Board therefore found it necessary to adopt a definition that could be applied "categorically" to a range of different offenses. *Ibid.* Yet States "categorize and define crimes against children in many different ways," making it "difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of an offense category or the meaning of those elements." *Id.* at 39a (citations omitted). Even when limited to "the subset of sex crimes referred to as 'statutory rape,'" the Board observed, "[m]ost States have multiple provisions governing this type of offense and vary widely in both the extent and existence of age gaps." *Id.* at 39a-40a. The Board therefore found it appropriate to "proceed incrementally," rather than attempt to devise a single definition covering all crimes involving minors. *Id.* at 40a.

Finally, the Board applied its definition of "sexual abuse of a minor" to petitioner's offense under California Penal Code § 261.5(c). Since that statute "requires that the minor victim be 'more than three years younger' than the perpetrator," the Board explained,

any conviction "categorically constitutes 'sexual abuse of a minor' and is an aggravated felony" under the INA. Pet. App. 40a-41a. The Board thus determined that petitioner's conviction "renders him removable," and it dismissed his appeal. *Id.* at 41a.

c. The court of appeals denied a petition for review. Pet. App. 1a-15a.

The court of appeals first determined that *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "supplies the appropriate framework for reviewing the Board's interpretation of 'sexual abuse of a minor.'" Pet. App. 4a; see *ibid.* ("The Supreme Court and Sixth Circuit have repeatedly held that *Chevron* deference applies to the Board's interpretations of immigration laws."); see also *id.* at 4a-5a (citing cases). Although petitioner urged the court instead to "ignore *Chevron* and create [its] own definition of 'sexual abuse of a minor,'" the court found that proposition to be "at odds with basic black-letter administrative law." *Id.* at 5a-6a. The court also rejected petitioner's contention that the Attorney General was not entitled to deference in construing the INA's aggravated felony definition because the definition has criminal as well as civil applications, which, petitioner contended, required the court to resolve ambiguity through principles of lenity instead. *Id.* at 7a-8a. The court explained that that argument was expressly rejected in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-704 (1995), in which the Court deferred to the Secretary of the Interior's interpretation of a statute enforceable through criminal penalties as well as civil measures. Pet. App. 9a.

Next, the court of appeals concluded that the Board's precedential decision in this case had permissibly construed the term "sexual abuse of a minor" to include violations of California Penal Code § 261.5(c). Pet. App. 11a. The court noted that that phrase, which is not defined in the INA, is "ambiguous." *Ibid.* To give content to the terms "sexual abuse" and "minor," therefore, the Board had reasonably relied on definitions drawn from other federal laws. *Id.* at 11a-12a (citing 18 U.S.C. 3509(a)(2) and (8)). The Board had been "sensible," moreover, to decline petitioner's invitation to adopt "the narrow definition of 'minor' in" a different federal provision, 18 U.S.C. 2243(a), which applies to children only between the ages of 12 and 16 years old. Pet. App. 13a; see *ibid.* ("We should not haphazardly import the requirements of § 2243(a) into a completely different statute."). Finally, the court noted that the "sexual abuse of a minor" provision, unlike the provisions identifying some other aggravated felonies, does not cross-reference any other federal law. That choice suggested that Congress "wanted to sweep in a broad array of state-law convictions" for abusive sexual conduct toward minors, rather than only those convictions that matched a particular federal crime. *Id.* at 14a.

Judge Sutton concurred in part and dissented in part. Pet. App. 16a-26a. He agreed with the majority that the statute was ambiguous. See *id.* at 19a-21a. Rather than apply *Chevron* deference, however, Judge Sutton would have applied the rule of lenity to resolve the ambiguity in petitioner's favor. *Id.* at 21a. In his view, a statute with both civil and criminal applications must be interpreted in the same manner in both contexts, such that "the 'lowest common denominator'

—including all rules applicable to the interpretation of criminal laws—governs all of [the statute's] applications." *Id.* at 18a (citation omitted); see *id.* at 21a-23a. Judge Sutton also disagreed with the majority's reading of *Sweet Home*, *id.* at 23a-24a, and argued that his approach was consistent with other circumstances in which *Chevron* deference has been found to be "categorically unavailable," *id.* at 25a-26a.

SUMMARY OF ARGUMENT

Under the categorical approach, petitioner's prior conviction under California law constitutes "sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), and therefore qualifies as an aggravated felony.

A. 1. The first step of the categorical approach requires interpreting the federal provision at issue. The term at issue here, "sexual abuse of a minor," is most naturally read to encompass all sexual crimes committed against those under age 18. That meaning is most consistent with contemporary dictionary definitions and with the "everyday understanding" of the phrase. *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006). It is consistent as well with the provision's legislative history, which is sparse but generally indicates that Congress intended to reach a wide range of sexual misconduct involving children. Although this Court has sometimes looked to state law to help determine the meaning of a federal provision, doing so is not helpful here: The term "sexual abuse of a minor" lacks common law roots or an established meaning in state law; and statutes that protect minors from sexual misconduct vary widely in their elements.

2. Petitioner does not attempt to define the term "sexual abuse of a minor." Instead, he argues that, *whatever* the term's meaning, his California conviction

must be excluded based on the following proposed methodology: He asks whether the "least culpable conduct" proscribed by his California offense—sex between a 17-year-old victim and a perpetrator who is three years older—would be illegal under the current laws of most States, looking as well at the Model Penal Code and an analogous federal criminal statute, 18 U.S.C. 2243(a). Because it would not, he argues that Section 1101(a)(43)(A) must be read to exclude his California conviction. For several reasons, petitioner's proposed methodology is flawed.

First, petitioner misunderstands the role of multi-jurisdictional surveys in this Court's jurisprudence. Such surveys can sometimes be useful when interpreting a federal provision that has a well-established meaning under state law. The Court has thus looked to state law when interpreting statutory terms derived from the common law. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598-599 (1990) (burglary). But a multi-jurisdictional analysis is in no way *required* when the meaning of a federal provision is being determined at step one of the categorical approach. And indeed, most of this Court's categorical-approach cases have not looked at state law when interpreting federal statutory language.

Second, petitioner's proposed methodology conflates the distinct steps of the categorical approach. Step one requires interpreting the federal provision at issue; step two requires comparing the elements of the prior state offense with the federal provision. At the second step, the Court presumes that the state conviction "rested upon nothing more than the least of the acts criminalized, and then determine[s] whether even those acts are encompassed by the generic federal

offense." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013) (brackets, citation, and internal quotation marks omitted). Petitioner's methodology, by contrast, merges the two steps: Rather than asking what the federal provision means, and then comparing it to the elements of his state offense, petitioner would compare the elements of his state offense directly against the laws *of other States*. In other words, petitioner seeks to determine whether his California offense is a categorical match—not with the federal provision—but with other States' statutes. That methodology is inherently skewed towards the lowest common denominator: When state statutes vary along multiple dimensions (as they do for state laws that protect minors from sexual abuse), petitioner's proposed test would exclude all but the most basic state offenses. That is not what Congress intended.

Third, petitioner's proposed methodology would be burdensome to apply, because it never gives content to the federal provision at issue—here, Section 1101(a)(43)(A)—other than by ruling in or out particular state offenses by means of a multi-jurisdictional survey. As a consequence, his methodology would require a new 50-State survey for each state offense under consideration. For instance, a different survey would be required for each of the dozen or so provisions of California law that protect minors against sexual abuse.

3. Even if the Court determines that the term "sexual abuse of a minor" does not yield a clear answer to the question of statutory interpretation at issue here, any uncertainty is properly resolved by principles of deference. The Board of Immigration Appeals—which exercises the Attorney General's au-

thority to conduct removal proceedings and construe the INA in doing so—has authority "to fill [the] gap" with a reasonable construction under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (citation omitted). In this case, the Board determined, based on textual indications, practical considerations, and logical reasoning, that unlawful "sexual intercourse with a 16- or 17-year-old is properly viewed as categorically 'abusive'" where there is "a meaningful age differential" of more than three years between the victim and perpetrator. Pet. App. 37a. That reading is "a permissible construction of the statute," which merits judicial deference. *Chevron*, 467 U.S. at 843.

Petitioner's arguments against deference are unpersuasive. First, he argues that deference is incompatible with the categorical approach, which he asserts must "err on the side of underinclusiveness." *Moncrieffe*, 133 S. Ct. at 1693. But that feature of the categorical approach comes from the second step, at which the elements of the state offense are compared with the federal provision to see whether even "the least of the acts criminalized" under state law are a categorical match. *Id.* at 1684 (brackets, citation, and internal quotation marks omitted). At the first step, when the federal provision is being construed, normal interpretive tools are brought to bear—and that includes *Chevron* deference.

Second, petitioner argues that affording deference would conflict with the principle that any lingering ambiguity in deportation statutes should be construed in favor of the alien. That principle, like the rule of lenity in criminal cases, comes into play only at the end of the process, after other interpretive aids have

been exhausted. And, as this Court's cases illustrate, deference to an agency's reasonable interpretation is a normal tool for ascertaining a federal statute's meaning.

Third, petitioner argues that deference is inapplicable because the provision being interpreted, Section 1101(a)(43)(A), has potential criminal applications: The INA imposes criminal punishment for certain misconduct committed by, or with respect to, aliens previously convicted of aggravated felonies. See 8 U.S.C. 1253(a)(1), 1326(b)(2), and 1327. Petitioner argues that Section 1101(a)(43)(A) should accordingly be treated as if it were a criminal statute, which the Attorney General would get no deference in interpreting.

Petitioner is incorrect. For one thing, a defendant will not face criminal consequences unless he commits further, wrongful conduct, beyond the aggravated felony itself. Petitioner's argument would also elevate the relatively rare role that the aggravated felony definition plays in criminal proceedings compared to the definition's central role in civil removal proceedings, where it is applied thousands of times a year. Moreover, his argument is inconsistent with several decisions in which this Court applied deference to an agency's reasonable construction of a civil statute notwithstanding the statute's potential criminal applications. Finally, petitioner's argument could upend the Attorney General's traditional function in interpreting the INA: Numerous provisions of the INA—dealing with everything from "moral turpitude" to terrorism—have potential criminal applications.

B. The second step of the categorical approach involves a determination whether the elements of the state offense fall within the federal provision. In this case, petitioner's California offense qualifies either

under a plain-language interpretation of Section 1101(a)(43)(A) or under the Board's reasonable interpretation of that provision.

ARGUMENT

UNDER THE CATEGORICAL APPROACH, PETITIONER'S CALIFORNIA CONVICTION IS AN AGGRAVATED FELONY

"Because Congress predicated deportation 'on convictions, not conduct,'" the categorical approach is used to determine whether a state conviction qualifies as an "aggravated felony" under the INA. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 & n.3 (2015) (quoting Das 1701). That approach consists of a two-step process: First, it is necessary to interpret the federal provision under consideration. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598 (1990) (identifying "the generic, contemporary meaning" of the federal statutory term "burglary"). Second, "looking only to the statutory" elements of the state offense, a comparison must be made to determine whether a conviction under that state statute "necessarily implies that the defendant has been found guilty" of an offense that falls within the federal provision. *Id.* at 599-600. A categorical match will occur "if, but only if," the state statute sweeps no more broadly than the federal provision, such that every conviction under the former will also satisfy the latter. *Mathis* v. *United States*, 136 S. Ct. 2243, 2247 (2016). Following that framework resolves this case.

A. Step One: Interpreting "Sexual Abuse Of A Minor"

"Our analysis begins with the language of the statute." *Leocal* v. *Ashcroft*, 543 U.S. 1, 8 (2004). The term at issue here is "sexual abuse of a minor." 8 U.S.C. 1101(a)(43)(A). Familiar tools of statutory in-

terpretation may be used to determine its "ordinary meaning." *Leocal*, 543 U.S. at 11. Under a plain-language interpretation, "sexual abuse of a minor" is most naturally construed to encompass all sexual crimes committed against individuals less than 18 years old. To the extent that "Congress has not directly addressed the precise question at issue," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), the term is subject to a reasonable construction by the agency that administers it. Accordingly, the Board of Immigration Appeals—the entity that exercises the Attorney General's authority to conduct removal proceedings and interpret the INA—has authority "to fill [that] gap" with a reasonable construction. *Ibid.* (citation omitted).

1. The plain language of Section 1101(a)(43)(A) applies to illegal sexual acts involving minors

In past cases, this Court has used a variety of tools to determine the meaning of terms listed in the INA. In this case, those tools point to a broad interpretation of the term "sexual abuse of a minor."

a. "[W]e begin by looking at the terms of the provisions and the 'commonsense conception' of those terms." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 573-574 (2010) (quoting *Lopez* v. *Gonzales*, 549 U.S. 47, 53 (2006)). Unlike other aggravated felonies such as "burglary" or "perjury," see 8 U.S.C. 1101(a)(43)(G) and (S), "sexual abuse of a minor" is neither a common law offense nor a legal term of art. See Wayne R. LaFave, *Criminal Law* § 2.1(b), at 79-80 (5th ed. 2010) (identifying a list of common law crimes but not including either sexual abuse of a minor or statutory rape); *id.* § 17.4(c), at 920 ("Under early English common law, sexual relations with a child, no matter

how young, was not regarded as rape if the child consented."). Nor did Congress define the term by means of a cross-reference to another federal statute, as it did for several other aggravated felonies. See, *e.g.*, 8 U.S.C. 1101(a)(43)(D) ("an offense described in section 1956 of title 18"). The most probative evidence of "what Congress probably meant," therefore, is the term's "regular usage." *Lopez*, 549 U.S. at 53. Indeed, because Congress has not itself defined "sexual abuse of a minor" in the INA, "the everyday understanding of" that term "should count for a lot here." *Ibid.*

Congress added "sexual abuse of a minor" to the INA in 1996, as part of a comprehensive overhaul of the Nation's immigration laws. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. B, § 321(a)(1), 110 Stat. 3009-627. At that time, the commonly accepted definition of "sexual abuse" was "[i]llegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance." See *Black's Law Dictionary* 1375 (6th ed. 1990) (*Black's*); cf. 15 *Oxford English Dictionary* 108 (2d ed. 1989) (defining "sex offense" as "a breach of law * * * involving sex"). The term "minor," in turn, was defined as "[a]n infant or person who is under the age of legal competence," which "[i]n most states" was 18 years old. *Black's* 997. That commonsense definition is also consistent with the use of "minor" in other provisions of the immigration laws. See 8 U.S.C. 1182(a)(9)(B)(iii)(I) (exception for accruing of unlawful presence by "Minors": "No period of time in which an alien is under 18 years of age shall be taken into account"); 8 U.S.C. 1232(c)(2)(B) (Supp. III 2015) (place-

ment for unaccompanied alien child who arrives as a "minor" but then "reaches 18 years of age").

Contemporary definitions of "sexual abuse of a minor" thus suggest a "common usage of the term [that] includes a broad range of maltreatment of a sexual nature." *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (B.I.A. 1999). The language most naturally connotes conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old. Absent indications that Congress intended to depart from the term's "regular usage," then, that is "what Congress probably meant." *Lopez*, 549 U.S. at 53; see *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012) (relying on dictionary definition from "[w]hen subparagraph (M) was enacted" to determine its meaning).

b. Relevant legislative history is sparse but generally supports a broad interpretation of "sexual abuse of a minor" in Section 1101(a)(43)(A). At the same time that Congress added that provision to the definition of "aggravated felony," it also added, as a grounds for deportation, a conviction for "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." IIRIRA § 350(a), 110 Stat. 3009-639 (8 U.S.C. 1227(a)(2)(E)(i)). Congress thus adopted multiple, overlapping provisions providing for removal of aliens who commit offenses against minors. That was no coincidence, see H.R. Rep. No. 828, 104th Cong., 2d Sess. 228 (1996), but rather was part of a larger, deliberate attempt to create a "comprehensive statutory scheme to cover crimes against children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994. Reading the term "sexual abuse of a minor" to include the full range of sexual crimes

against those under the age of 18 therefore "best reflects * * * the intent of Congress in expanding the definition of aggravated felony to protect children." *V-F-D-*, 23 I. & N. Dec. at 862.

c. This Court, in other cases involving the categorical approach, has sometimes looked to state law to help determine the meaning of the federal provision at issue. See *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 189 (2007); *Taylor*, 495 U.S. at 598. That methodology is most useful where Congress has chosen a term that carries an established "common-law meaning" or a "specialized legal usage," *Johnson* v. *United States*, 559 U.S. 133, 139 (2010), or where state law "uniformly treats" the conduct in a particular manner, *Duenas-Alvarez*, 549 U.S. at 190. But such is not the case here: The term "sexual abuse of a minor" does not have a specialized legal meaning, and statutes addressing sexual offenses against children vary considerably in their particulars.

States protect minors from sexual abuse under a wide variety of criminal provisions. Some forbid sexual contact with minors who are related to the perpetrator, see, *e.g.*, Or. Rev. Stat. § 163.375(1)(c); others apply to minors who are connected to the perpetrator by a relationship of trust or authority, see, *e.g.*, Conn. Gen. Stat. Ann. § 53a-71(a)(9)(B). Still other offenses are based on the victim's age alone, under the premise that persons below a certain minimum age are unable to provide legally meaningful consent to sexual activity. Those offenses, often referred to as "statutory rape," see *Black's* 1412, typically vary across at least four different dimensions: (1) the age of the victim; (2) the age of the offender; (3) the age differential

between the victim and offender; and (4) the offense conduct.

Victim's age. All States have chosen an age of the victim below which some sexual conduct is forbidden but above which consensual sexual contact is permitted —the so-called "age of consent." See *Black's* 65. Jurisdictions variously set the age at 18 years old (12 States), 17 years old (7 States), and 16 years old (31 States and the District of Columbia). See App., *infra*, 1a-9a (table listing all States by their ages of consent).

Offender's age. Many state statutes set a minimum age for the offender. Examples include 16 years old,[3] 17 years old,[4] 18 years old,[5] 19 years old,[6] 20 years old,[7] 21 years old,[8] 24 years old,[9] 25 old years,[10] and 30 years old.[11]

Age differential. Some state statutes impose criminal liability without regard to whether the partici-

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[3] Iowa Code Ann. § 709.8(1); S.D. Codified Laws § 22-22-7; W.Va. Code Ann. § 61-8B-5(a)(2).

[4] Alaska Stat. §§ 11.41.436(a)(1), 11.41.438(a); 720 Ill. Comp. Stat. Ann. 5/11-1.40(a)(1), 5/11-1.60(c)(1); Miss. Code Ann. § 97-3-65(1)(a).

[5] Del. Code Ann. tit. 11, §§ 772(a)(2)(g), 773(a)(5); Ky. Rev. Stat. Ann. § 510.050; Okla. Stat. Ann. tit. 21, § 1114.A.1.

[6] Ariz. Rev. Stat. Ann. §§ 13-1405, 13-1407(F); Del. Code Ann. tit. 11, § 771(a)(1); Neb. Rev. Stat. Ann. §§ 28-319(1)(c), 28-319.01(1)(a), 28-320.01(1).

[7] Ark. Code Ann. § 5-14-127(a)(1).

[8] Ind. Code Ann. § 35-42-4-3(a)(1); Mo. Ann. Stat. §§ 566.034, 566.064; Or. Rev. Stat. § 163.425(1)(b).

[9] Fla. Stat. Ann. § 794.05(1).

[10] Neb. Rev. Stat. Ann. § 28-319.01(1)(b).

[11] Del. Code Ann. tit. 11, § 770(a)(2).

pants are of different ages.[12] Other statutes require age differentials of varying lengths: at least one day,[13] at least 2 years,[14] at least 3 years,[15] at least 4 years,[16] at least 5 years,[17] between 4 and 7 years,[18] between 4 and 9 years,[19] between 5 and 9 years,[20] at least 6 years,[21] at least 7 years,[22] between 7 and 10 years,[23] between 8 and 11 years,[24] and at least 10 years.[25] See App., *infra*, 1a-9a (listing required age differentials for state offenses involving minors just under the age of consent).

Offense conduct. States prohibit a wide range of sexual behavior with minors, including: sexual inter-

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[12] Colo. Rev. Stat. § 18-3-404(1.5); Del. Code Ann. tit. 11, § 768; S.D. Codified Laws § 22-22-7.3.

[13] Va. Code Ann. § 18.2-371 (outlawing sexual contact with a "Child" by "[a]ny person 18 years of age or older"); see *id.* § 1-207 (defining "child" as "a person less than 18 years of age").

[14] Ariz. Rev. Stat. Ann. § 13-1407(F); Minn. Stat. Ann. § 609.344.1(b); Miss. Code Ann. §§ 97-3-65(1)(b), 97-3-95(1)(d).

[15] Idaho Code Ann. § 18-6101(2); La. Rev. Stat. Ann. § 14:43.1(A)(2); Me. Rev. Stat. Ann. tit. 17-A, § 255-A(1)(E) to (F-1).

[16] Del. Code Ann. tit. 11, § 778(3); N.M. Stat. Ann. § 30-9-11(G)(1); Utah Code Ann. § 76-5-401.1(2).

[17] Me. Rev. Stat. Ann. tit. 17-A, §§ 254(1)(A), 260(1)(C); Mass. Ann. Laws ch. 265, § 23A(a); N.H. Rev. Stat. Ann. § 632-A:4(I)(b).

[18] 18 Pa. Cons. Stat. Ann. § 3122.1(a)(1).

[19] Tenn. Code Ann. § 39-13-506(b)(1).

[20] Tenn. Code Ann. § 39-13-506(b)(2).

[21] N.C. Gen. Stat. §§ 14-27.25(a), 14-27.30(a).

[22] Cal. Penal Code § 269.

[23] Utah Code Ann. § 76-5-401.2(2)(a)(i).

[24] 18 Pa. Cons. Stat. Ann. § 3122.1(a)(2).

[25] Del. Code Ann. tit. 11, § 771(a)(1); Mass. Ann. Laws ch. 265, § 23A(b); Tenn. Code Ann. § 39-13-506(c).

course,[26] any sexual penetration,[27] sodomy and deviate sexual intercourse,[28] sexual contact (including touching over clothes),[29] sexual battery,[30] oral sexual acts,[31] sexual acts with objects,[32] lewd and lascivious conduct,[33] fondling or molestation,[34] and indecent exposure.[35]

Even limiting the inquiry to the subset of statutory-rape offenses that cover sexual intercourse with minors who are close to the age of majority, commonalities are hard to perceive. Twelve States currently set an age of consent at 18 years old, and those States make up approximately 32% of the total United States population; seven States, comprising an additional 23% of the population, have set the age of consent at

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[26] Ga. Code Ann. § 16-6-3; Mont. Code Ann. § 45-5-503; Wash. Rev. Code Ann. §§ 9A.44.076, 9A.44.079.

[27] Haw. Rev. Stat. Ann. § 707-730(1)(b) and (c); Tenn. Code Ann. § 39-13-531; Tex. Penal Code Ann. § 22.011.

[28] Kan. Stat. Ann. § 21-5504(a)(3); N.Y. Penal Code §§ 130.40(2), 130.45(1), 130.50(3) and (4); Va. Code Ann. § 18.2-67.2(A)(1).

[29] Conn. Gen. Stat. Ann. § 53a-73a(a)(1)(A); Mich. Comp. Laws Ann. § 750.520c(1); W.Va. Code Ann. §§ 61-8B-7(a)(3), 61-8B-9.

[30] Fla. Stat. Ann. § 794.011(2); Mass. Ann. Laws ch. 265, § 13B; S.C. Code Ann. § 16-3-655(A)(1) and (B)(1).

[31] Cal. Penal Code §§ 288a(b); 288.7(b), La. Rev. Stat. Ann. § 14:43.1(A)(2); N.Y. Penal Code §§ 130.40(2), 130.45(1), 130.50(3) and (4).

[32] N.Y. Penal Code §§ 130.66(1)(c), 130.70(1)(c); Okla. Stat. Ann. tit. 21, § 1111.1.A; Utah Code Ann. § 76-5-402.3(1).

[33] Fla. Stat. Ann. § 800.04(4)(a); Iowa Code Ann. § 709.8, 709.14; S.C. Code Ann. § 16-3-655(C).

[34] Ind. Code Ann. § 35-42-4-9(b); Kan. Stat. Ann. § 21-5506(a), (b)(2), and (b)(3); Miss. Code Ann. § 97-5-23.

[35] Fla. Stat. Ann. § 800.04(7); Ind. Code Ann. § 35-45-4-1(b); Ky. Rev. Stat. Ann. § 510.148.

17 years old.[36] See p. 19, *supra*. Looking collectively at those States' laws, the minimum age differential under almost two-thirds of them (12 of 19) is three years or less. See App, *infra*, 1a-4a. At the time that the term "sexual abuse of a minor" was added to Section 1101(a)(43)(A), several of those States had imposed an even shorter age-differential requirement or had required none at all. See, *e.g.*, Idaho Code Ann. § 18-6101 (1996) (none); Wyo. Stat. Ann. § 14-3-105 (1996) (none).

Thus, as courts of appeals have recognized, state statutes protecting minors exhibit "wide variations in prohibited conduct * * * [that] make it difficult, if not impossible, to determine whether a majority consensus exists with respect to the element components of [the] offense." *United States* v. *Rodriguez*, 711 F.3d 541, 556 (5th Cir.) (en banc), cert. denied, 134 S. Ct. 512 (2013). State laws do not prescribe "uniform[] treat[ment]" for such conduct, *Duenas-Alvarez*, 549 U.S. at 190, nor can such laws be distilled into a common set of "basic elements," *Taylor*, 495 U.S. at 599. Accordingly, there is no reason to assume that Congress intended—in using general terms ("sexual abuse" and "minor") that have ordinary and commonly understood meanings—to track any particular formulation under state law. See *Johnson*, 559 U.S. at 139 ("[W]e do not assume that a statutory word is used as a term of art where that meaning does not fit.").

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[36] Figures calculated based on U.S. Census Bureau population data, http://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx.

2. *Petitioner's alternative approach to interpreting Section 1101(a)(43)(A) is erroneous*

Petitioner makes no attempt to define the term "sexual abuse of a minor," even with regard to the subset of statutory-rape offenses. Instead, petitioner argues (Br. 14), *whatever* the meaning of that term, his prior conviction under California law does not qualify because most state jurisdictions currently do not criminalize the "least culpable conduct" proscribed by that California law. He also faults (Br. 22-23) the Board and the court of appeals for failing to "conduct a multi-jurisdictional survey," which he describes (*ibid.*) as a key part of "*Taylor*'s methodology." Finally, petitioner claims (Br. 17) that his California offense cannot be an aggravated felony because it is broader than an analogous provision in the Model Penal Code and a federal criminal statute, 18 U.S.C. 2243(a). Petitioner's arguments are unpersuasive.

a. As an initial matter, petitioner misunderstands the role of multi-jurisdictional surveys in this Court's jurisprudence. The first step of the categorical approach requires interpretation of the federal provision at issue, a task that involves normal tools of statutory construction. See *Taylor*, 495 U.S. at 596-597 (considering and rejecting a proposed construction of "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), because "it is not supported by the language of the statute or the legislative history"). A multi-jurisdictional survey can sometimes be useful insofar as it helps shed light on the "common understanding and meaning" of the federal provision being interpreted. *Perrin* v. *United States*, 444 U.S. 37, 45 (1979). This Court has accordingly undertaken multi-jurisdictional analyses in some of its categorical-

approach cases when attempting to define a term with common law roots. See *Duenas-Alvarez*, 549 U.S. at 189-190 (theft); *Taylor*, 495 U.S. at 598-599 (burglary). But so, too, has the Court surveyed state law, in cases unrelated to the categorical approach, when interpreting statutory terms derived from the common law. See, *e.g.*, *Evans* v. *United States*, 504 U.S. 255, 262-264 & n.13 (1992) (surveying state law in defining "extortion" under the Hobbs Act); *Perrin*, 444 U.S. at 43-45 (bribery under the Travel Act); *United States* v. *Nardello*, 393 U.S. 286, 293-294 (1969) (extortion under the Travel Act); see also *Morissette* v. *United States*, 342 U.S. 246, 262 & nn.20 & 21 (1952) (using "exhaustive studies of state court cases" to determine "definition" of prohibition against "steal[ing]" government property under 18 U.S.C. 641, an offense "incorporated from the common law"); cf. *Moskal* v. *United States*, 498 U.S. 103, 115 (1990) (declining to interpret federal statutory term by reference to its use under state law where litigant "failed to demonstrate that there was, in fact, an 'established' meaning of [the term] at common law"). The relevant question —in either context—is whether a survey of state law will help "determine the meaning" of the statutory language at issue. *Taylor*, 495 U.S. at 577.

Nothing about the categorical approach *requires* a multi-jurisdictional analysis, however. To the contrary, this Court has often resolved its categorical-approach cases without doing so—particularly where the federal provision at issue does not use a common law term. See, *e.g.*, *Torres* v. *Lynch*, 136 S. Ct. 1619, 1626 (2016) (using "contextual considerations" to determine what it means for an offense to be "described in" Section 1101(a)(43)); *Carachuri-Rosendo*, 560 U.S. at 573-574

(interpreting "aggravated felony" and "illicit trafficking" based on "the everyday understanding of those terms") (citation and internal quotation marks omitted); *Lopez*, 549 U.S. at 53 (interpreting aggravated felony of "illicit trafficking" under the INA based on the "everyday understanding" of that term); *Leocal*, 543 U.S. at 8-9 (construing "use of physical force" in crime of violence definition, 18 U.S.C. 16, based on statute's "language" and "context"). And in *Johnson*, the Court explicitly rejected the relevance of state law when interpreting the word "force" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i), because the Court was unpersuaded that Congress intended to give the word "the specialized meaning that it bore" under the common law. 559 U.S. at 139. Petitioner is thus wrong to insist (Br. 15) that the "parameters" of a federal provision "must be derived" from a survey of state criminal codes.

b. Petitioner's proposed methodology (Br. 17) for conducting a "multi-jurisdictional analysis" also conflates the distinct steps of the categorical approach. The primary question in this case is what Congress meant when it used the term "sexual abuse of a minor" in Section 1101(a)(43)(A). Answering that question is the first step of the categorical approach. See pp. 14-15, *supra*. Petitioner, however, would ask (Br. 17) a far different question—namely, whether "the least of the acts criminalized under" his prior California offense would be "lawful" in most States. But consideration of the elements of the state offense takes place at the *second* step of the categorical approach, in determining whether the state offense falls within the federal provision. At that step, the Court "presume[s] that the [state] conviction 'rested upon

nothing more than the least of the acts' criminalized, and then determine[s] whether even those acts are encompassed by the generic federal offense." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013) (brackets omitted) (quoting *Johnson*, 559 U.S. at 137). Viewing the state conviction in that restrictive way helps answer the question whether a categorical match exists: If even the least of the acts criminalized by the state statute falls within the federal provision, then conviction of the state offense "necessarily implies" that the federal provision has been satisfied. *Taylor*, 495 U.S. at 599; see *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013).

Before the state and federal provisions can be compared, however, it must first be determined what the federal provision *means*—a question as to which an analysis of the acts covered by the state offense offers little guidance. Petitioner's proposed methodology is thus a strange hybrid of the two different steps of the categorical approach: Petitioner would compare what he regards as the "least culpable conduct" punishable under his California offense, not against the federal provision at issue, but against the laws *of other States*. In other words, petitioner essentially seeks to determine whether his state conviction is a categorical match with all (or almost all) other States' statutes. This Court has never adopted such a test or undertaken that task, even in its decisions that generally surveyed state law. And petitioner's methodology would skew the results to the lowest common denominator and magnify even small differences in state law.

To illustrate why, consider three different statutory-rape laws. In Georgia, intercourse with a person

younger than 16 years old is illegal regardless of the perpetrator's age. Ga. Code Ann. § 16-6-3(a). Missouri prohibits sex with a person younger than 17 years old, but only if the perpetrator is at least 21 years old. Mo. Ann. Stat. § 566.034. And Florida makes sex with a person younger than 18 years old illegal for perpetrators who are at least 24 years old. Fla. Stat. Ann. § 794.05(1).

State	*Age of victim*	*Age of perpetrator*
Georgia	15 or younger	no minimum
Missouri	16 or younger	21 or older
Florida	17 or younger	24 or older

Comparing those offenses under petitioner's methodology would mean that *none* of those statutes would be a match with the others, since the "least culpable conduct" under each State's formulation of the offense would not be illegal under the other two States' statutes: The least-culpable conduct under the Florida offense (sex between a 17-year-old victim and a 24-year-old perpetrator) would be illegal only in Florida. The same is true for the least-culpable conduct under the Missouri statute (16-year-old victim, 21-year-old perpetrator) and under the Georgia statute (sex between two 15 year olds). Under petitioner's methodology, only a state statute that adopted the "lowest common denominator"—incorporating *both* Georgia's 16-year-old age of consent *and* Florida's 24-year-old perpetrator requirement—would be a categorical match to all three.

Petitioner's methodology thus uses variation among the States as a way to narrow the meaning of the

federal provision, Section 1101(a)(43)(A). And, as noted above, insofar as state statutes prohibiting sexual contact with minors are concerned, variation abounds. See pp. 18-22, *supra*. No reason exists to think that Congress selected the phrase "sexual abuse of a minor" as a means of singling out only the lowest-common-denominator state offenses—*i.e.*, only the abusive conduct directed at minors as to which States happen to have legislated uniformly. To the contrary, Congress's choice of broad and general language, not tied to any particular federal statute or legal term of art, indicates that it intended to include state offenses that address the full range of sexually abusive conduct.

c. Petitioner's methodology would also be difficult and burdensome to apply, because it would require a new 50-State survey for each state offense under consideration. This Court's normal approach, in which traditional tools of statutory interpretation are used to construe the federal provision at issue, is consistent with the way federal statutes are typically interpreted. Once the meaning of that federal provision is determined (step one), it can be compared with relative ease against a wide variety of state statutes to test for a categorical match (step two). Petitioner's methodology, by contrast, never gives interpretive content to the federal provision, other than by ruling in or out particular state offenses by means of a "Multi-Jurisdictional Survey." Pet. Br. 15. As a result, each time a new state offense is at issue, a new multi-State survey would be required to check for a "consensus." *Ibid.*

For instance, even after this Court resolves whether petitioner's conviction under California Penal Code § 261.5(c) counts as "sexual abuse of a minor," a new

multi-jurisdictional survey would have to be conducted for an offender who was convicted under Subsection (d), which sets different ages for the perpetrator (21 years or older) and victim (less than 16 years); or for an offender who was convicted under any of the myriad other felony provisions of California law that protect minors. See California Penal Code §§ 269(a)(3), (4), and (5), 286(b)(2) and (c)(1), 288(a), (c)(1), and (c)(2), 288a(b)(2) and (c)(1), 288.5(a), 288.7(a) and (b). And because, in petitioner's view, "the categorical approach directs courts to consider the criminal law as it existed 'at the time Congress enacted' the statute at issue," Pet. Br. 18 (quoting *Perrin*, 444 U.S. at 42), he apparently would require that each state offense be compared against all other States' law "as [they] existed" when the relevant aggravated felony provision was adopted. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7342, 102 Stat. 4469 (creating the aggravated felony definition); Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 501, 104 Stat. 5048 (expanding the definition); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, Tit. II, § 222, 108 Stat. 4320 (same); IIRIRA § 321, 110 Stat. 3009-627 (same); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No 108-193, § 4(b)(5), 117 Stat. 2879 (same). Even petitioner has not undertaken that onerous task.[37]

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[37] Although in 1996, as today, no consensus existed as to the elements of state statutory-rape offenses, there are some meaningful differences between the two time periods. For instance, whereas Mississippi's current statute sets the age of consent at 16 years old and requires a 3-year age differential, see Miss. Code. Ann. § 97-3-65(1)(a), in 1996 the State set the age of consent at 18 years old and required only that the perpetrator be "older" than the victim, *id.*

This Court should not require immigration judges and the Board—and, on judicial review, the courts—to conduct 50-State surveys of now-defunct state statutes. Nor could that methodology meaningfully accomplish petitioner's asserted purpose of "put[ting] people like [petitioner] clearly on notice" about which state convictions are or are not aggravated felonies. Pet. Br. 40.

d. Petitioner further errs in arguing (Br. 20-21) that a "consensus" exists on the question presented because the States whose statutes categorically match California's generally reserve the term "abuse" for other crimes. Virginia, for instance, uses the term "abused" only where a minor suffers misconduct at the hands of a parent or "other person responsible for his care." Va. Code Ann. § 16.1-228.4. But Virginia also prohibits "[a]ny person 18 years of age or older" from "engag[ing] in consensual sexual intercourse" with a "child," *id.* § 18.2-371(ii), defined by statute to mean "a person less than 18 years of age," *id.* § 1-207. Thus, even under petitioner's erroneous methodology, his California conviction is a categorical match with Virginia's statutory-rape law. The result is no different simply because Virginia decided to label that crime something other than "abuse." See *Taylor*, 495 U.S. at 592 ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."); see also *Johnson*, 559 U.S. at 138 (determining whether the level of force required by a state statute constitutes "physical force" under federal law "is a question

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§ 97-3-67 (1994). Compare, *e.g.*, Wyo. Stat. Ann. § 6-2-316(a)(iv) (17-year-old age of consent, 4-year age differential), with *id.* § 14-3-105 (1996) (18-year-old age of consent, no age differential).

of federal law, not state law"). Indeed, petitioner even claims (Br. 21) that *California itself* is evidence for his position because a judicial opinion from an intermediate state court, see *In re Kyle F.*, 5 Cal. Rptr. 3d 190, 194 (Cal. Ct. App. 2003), and an opinion letter from the State's attorney general, see Opinion No. 83-911, 67 Op. Cal. Att'y Gen. 235 (June 1, 1984), refrain from using the word "abuse" to describe sex involving a 16 year old. The notion that Congress tethered federal law to those sources when it chose language for Section 1101(a)(43)(A) is unfounded.

This is not a case in which Congress borrowed a term with a well-established, durable, and uniform meaning in state law. Cf. *Taylor*, 495 U.S. at 598. Only four States and the District of Columbia have offenses titled "sexual abuse of a minor," and they differ substantially with one another as to the characteristics of the perpetrator and victim and as to the scope of covered conduct. See Alaska Stat. §§ 11.41.434-11.41.440; D.C. Code §§ 22-3009.01, 22-3009.02, 22-3010.01; Me. Rev. Stat. Ann. tit. 17-A, § 254; Utah Code Ann. § 76-5-401.1; Wyo. Stat. Ann. §§ 6-2-314 to 6-2-317. The "paucity" of state statutes using the term, and the variation among them, make it "highly improbable" that Congress sought to tie the INA's aggravated felony definition to the laws of those States. *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); see *Lopez*, 549 U.S. at 54 (in construing aggravated felony of "illicit trafficking" in a controlled substance, declining to equate felony treatment with "trafficking," because "several States deviate significantly from th[at] pattern").

e. Petitioner's other interpretive arguments are similarly misguided.

i. Petitioner insists (Br. 12) that the "generic definition of a crime" depends in part on the "way the offense is defined under * * * the Model Penal Code." He notes (Br. 15-16) that the Court cited the Code as confirmation for its interpretation of the federal provisions at issue in *Taylor* and *Perrin*, *supra*. And, because the Code creates a model offense that includes a 16-year-old age of consent and a 4-year age differential, see Model Penal Code § 213.3(1)(a) (1985) ("Corruption of Minors and Seduction"), petitioner argues that Congress must have wanted Section 1101(a)(43)(A) to apply only to state offenses that reach the same conduct.

Petitioner fails to mention, however, that the Court did *not* consult the Model Penal Code in categorical-approach decisions such as *Mellouli*, *Duenas-Alvarez*, *Leocal*, *Carachuri-Rosendo*, and *Kawashima*, *supra*. Cf. *Johnson*, 559 U.S. at 141 (citing the Model Penal Code, but not to confirm its consistency with the Court's interpretation of the federal provision at issue). In any event, *Taylor* and *Perrin* did not rely on the Code because of its special relevance to the categorical approach. (Indeed, *Perrin* was not a categorical-approach case.) The Court cited the Code in those cases to confirm the "contemporary meaning" of common law terms used by Congress: "burglary" in *Taylor*, 495 U.S. at 598 & n.8, and "bribery" in *Perrin*, 444 U.S. at 45 & n.11. But "sexual abuse of a minor" is not a common law term, see pp. 15-16, *supra*, nor is it a term that the Code itself uses.

Moreover, the drafters of the Model Penal Code, in crafting their model offense, did not maintain that their proposal reflected a consensus among state statutory-rape laws. To the contrary, the drafters

explained that "[m]odern revised statutes" exhibit "considerable variation in the age of the female victim that has been selected as the appropriate measure of ability to give effective consent." Model Penal Code & Commentaries § 213.3 cmt. 2, at 380 (1980). Since "there is no magic in the number 16" as the age of consent, the drafters "enclose[d] the figure in brackets in order to indicate that reasonable legislators might differ as to the precise age limit." *Ibid.*; see *id.* at 382 ("[T]he brackets surrounding the number 16 in Section 213.3 are meant to indicate, in addition to uncertainty about the proper age that should be selected, that it may also be proper to select a higher age in the case of deviate sexual relations."). Similarly, the drafters referred to the 4-year age differential as an "innovation" and explained that "[t]he age is bracketed * * * to indicate that the precise differential is one on which reasonable people may disagree." *Id.* at 386. Under these circumstances, the Model Penal Code does not support petitioner's view of Congress's intent in using the phrase "sexual abuse of a minor." To the contrary, the Code supports the Board's conclusion that the phrase should be interpreted in a way that respects and accommodates the variation among state statutes.

ii. Petitioner also emphasizes (Br. 17-19) that his California offense is not a categorical match with 18 U.S.C. 2243(a), a federal criminal prohibition titled "Sexual abuse of a minor or ward," which prohibits sexual acts where the victim is less than 16 years old and the perpetrator is "at least four years older" than the victim. That provision, petitioner reasons (Br. 17), "contains the only definition of [sexual abuse of a minor] in the U.S. Code." He argues (Br. 19) that the

provision should accordingly serve "as a guidepost" for interpreting the same language as it appears in Section 1101(a)(43)(A).

As an initial matter, petitioner does not contend that "sexual abuse of a minor" under the INA must be "define[d]" by 18 U.S.C. 2243(a). Pet. Br. 17. Nor could he, given that Section 1101(a)(43)(A), unlike other aggravated felony provisions, contains no cross-reference. Instead, petitioner argues that 18 U.S.C. 2243(a) "is simply the most relevant federal touchstone" for determining "the 'sense in which the term is now used.'" Pet. Br. 18 (quoting *Taylor*, 495 U.S. at 598). But the phrase "[s]exual abuse of a minor" is simply the title of 18 U.S.C. 2243, not a defined term used in its operative provisions. Thus, while "[s]exual abuse of a minor" is certainly an apt *description* of the conduct Congress chose to prohibit under that statute, there is no reason to think that the choice of title represented a determination by Congress of what the quoted phrase must *mean* in all of the other places it may be used. And as noted above, see pp. 15-16, *supra*, "sexual abuse of a minor" is *not* a term with an established common usage, and 18 U.S.C. 2243(a) is not consistent with the few state statutes that bear a similar title. See, *e.g.*, D.C. Code §§ 22-3009.01 and .02 (forbidding sexual contact by any adult "in a significant relationship" with a person less than 18 years old).

Nor is there evidence that Congress, in choosing a 16-year maximum for the victim's age and a 4-year age differential for the federal offense, was attempting to reflect the "the criminal codes of most States." *Taylor*, 495 U.S. at 598. Indeed, comparing state statutory-rape laws to 18 U.S.C. 2243(a) under petitioner's "least culpable conduct" methodology would

disqualify the laws of most States: 19 States set the age of consent at 17 or 18 years old, see pp. 19, 21-22, *supra*; see also App., *infra* 1a-4a; and of the States that set the age of consent at 16 or below, most prohibit sexual conduct with a perpetrator who is within 4 years of the victim's age. See, *e.g.*, Alaska Stat. § 11.41.434(a)(1) (3 years); Conn. Gen. Stat. Ann. § 53a-71(a)(1) (3 years); Ind. Code Ann. 35-42-4-9(a) and (b) (3 years); Ala. Code § 13a-6-62 (2 years); Ga. Code Ann. §§ 16-6-3(a), 16-6-4 (none); Mont. Code Ann. §§ 45-5-502(1), 45-5-503(1) (none), N.H. Rev. Stat. Ann. § 632-A:4(I)(c) (none); Vt. Stat. Ann. tit. 13, § 3252(c) (none).[38] Using 18 U.S.C. 2243 as a "guidepost" for defining "sexual abuse of a minor" would thus cause Section 1101(a)(43)(A) "to apply in so limited and so haphazard a manner" that it cannot be what Congress intended. *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009).

iii. Petitioner argues (Br. 31) that the pairing in Section 1101(a)(43)(A) of "sexual abuse of a minor" with "murder" and "rape" demonstrates that "the generic crime is meant to cover" only unusually severe conduct. As this Court observed in *Torres*, however, while the list of aggravated felonies does include particularly egregious conduct such as murder and rape, it also includes "such comparatively minor offenses as operating an unlawful gambling business, see [8 U.S.C.] § 1101(a)(43)(J), and possessing a firearm not identified by a serial number, see [8 U.S.C.] § 1101(a)(43)(E)(iii)." 136 S. Ct. at 1628. Statutory rape is no less serious than those and other listed

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[38] The federal offense is an outlier in another respect: It contains a defense for a perpetrator who "reasonably believed" the victim was 16 or older. 18 U.S.C. 2243(c)(1). Relatively few States authorize a reasonable-mistake defense.

offenses, which Congress has indisputably declared to be aggravated felonies. Nor, contrary to petitioner's assertion (Br. 31-32), is there evidence in the legislative history that when Congress added "sexual abuse of a minor" to a substantially expanded list of aggravated felonies under IRIIRA, it had anything other than a commonsense understanding of the term in mind. See pp. 17-18, *supra*. To the contrary, as the Third Circuit has observed, "[t]he comprehensive severity" of IRIIRA "strongly suggests that [a] narrow definition of 'sexual abuse of a minor' * * * is inconsistent with congressional intent." *Restrepo* v. *Attorney Gen. of the U.S.*, 617 F.3d 787, 795 n.8 (3d Cir. 2010).

3. The Board's reasonable interpretation of "sexual abuse of a minor" merits deference under Chevron

The term "sexual abuse of a minor" is thus most naturally read, based on its plain language and contemporary meaning, as applying to illegal sexual conduct directed at someone less than 18 years old. Even assuming, however, that "Congress has not directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, any uncertainty is properly resolved by the agency to which Congress has entrusted the statute's interpretation and administration. "[T]he question for the court" then becomes whether the "agency's construction of the statute which it administers * * * is based on a permissible construction of the statute." *Id.* at 842-843. Because the Board, on behalf of the Attorney General, has adopted a reasonable construction of Section 1101(a)(43)(A), deference to that interpretation is required.

a. "It is well settled that 'principles of *Chevron* deference are applicable to this statutory scheme.'"

Negusie v. *Holder*, 555 U.S. 511, 516 (2009) (quoting *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)); see *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws."); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment). The INA expressly confers upon the Attorney General the authority and responsibility to conduct removal proceedings, see 8 U.S.C. 1103(g), 1229a(a),[39] and it provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling," *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)). Because the Attorney General has vested her adjudicative and interpretive authority in the Board (while retaining ultimate authority), "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Id.* at 425 (citation and internal quotation marks omitted). Indeed, "[j]udicial deference in the immigration context is of special importance, for executive officials exercise especially sensitive political functions that implicate questions of foreign relations." *Negusie*, 555 U.S. at 517 (internal quotation marks omitted).

Accordingly, as courts of appeals have uniformly held, the Board is entitled to deference when it interprets the meaning of the term "aggravated felony" in the INA. See *Soto-Hernandez* v. *Holder*, 729 F.3d 1,

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[39] Some functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005).

3-4 (1st Cir. 2013); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001); *Restrepo*, 617 F.3d at 796-797 (3d Cir.); *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 169 (4th Cir. 2015), cert. denied, 136 S. Ct. 2386 (2016); *Alwan* v. *Ashcroft*, 388 F.3d 507, 513-515 (5th Cir. 2004); *Velasco-Giron* v. *Holder*, 773 F.3d 774, 776 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015); *Spacek* v. *Holder*, 688 F.3d 536, 538 (8th Cir. 2012); *Renteria-Morales* v. *Mukasey*, 551 F.3d 1076, 1081 (9th Cir. 2008); *Balogun* v. *U.S. Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006); cf. *Rangel-Perez* v. *Lynch*, 816 F.3d 591, 597-601 (10th Cir. 2016) (assuming the applicability of *Chevron*, but concluding there was no relevant agency decision to which to defer).

In this case, the Board reasonably gave concrete meaning to the term "sexual abuse of a minor" in Section 1101(a)(43)(A). The Board found "useful guidance" for interpreting that term in a federal provision that defines "sexual abuse" to mean "'the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.'" Pet. App. 30a (quoting 18 U.S.C. 3509(a)(8)). As the Board has explained, that definition is consistent both with contemporary dictionary definitions, see *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996 (citing *Black's* 1375), and with "common usage of the term," *ibid.* The Board further determined that "[a] victim of sexual abuse who is under the age of 18 is a 'minor'" for purposes of Section 1101(a)(43)(A). *V-F-D-*, 23 I. & N. Dec. at 859. That definition accords with other statu-

tory definitions, including a nearby provision of the INA, see *id.* at 861-862 & n.8 (citing 8 U.S.C. 1182(a)(9)(B)(iii)(I) and 18 U.S.C. 3509(a)(2)), as well as with dictionary definitions, see *id.* at 862. It also "best reflects the diverse State laws that punish sexually abusive behavior toward children, the common usage of the word 'minor,' and the intent of Congress in expanding the definition of an aggravated felony to protect children." *Ibid.*

To give further content to Section 1101(a)(43)(A) in the specific context of this case, the Board observed that certain sexual crimes against minors are abusive because they involve "exploitation." Pet. App. 35a (citation omitted). In particular, "there is an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity because minors as a group have a less well-developed sense of judgment than adults, and thus are at greater peril of making choices that are not in their own best interests." *Ibid.* (brackets, citation, and internal quotation marks omitted). That risk "is particularly great when the victim is not in the same peer group" as the perpetrator, the Board explained, because minors "'may not have the negotiation skills needed to promote self-protective behavior during sexual encounters, particularly with older, more experienced partners.'" *Id.* at 35a-36a (quoting Kim S. Miller et al., *Sexual Initiation with Older Male Partners And Subsequent HIV Risk Behavior Among Female Adolescents*, 29 Fam. Plan. Persp. 212, 214 (1997)). For cases involving intercourse with a 16- or 17-year-old minor, therefore, the Board determined that a 3-year age differential is "significant" because, in such cases, "the victim and the perpetrator are not in the same peer group." *Id.*

at 36a (citing Miller 214). In the Board's view, giving content in that manner to the term "sexual abuse of a minor" properly accounts for "the large number and variety of statutes that are potentially at issue," *id.* at 40a, without improperly sweeping in non-abusive behavior such as consensual intercourse "between high school peers who are separated in age by, for example, only 2 years," *id.* at 37a.

In sum, the Board reasonably interpreted the phrase "sexual abuse of a minor" in light of its plain language, legislative history and purpose, and context. To the extent that the Court finds the scope of Section 1101(a)(43)(A) to be ambiguous, the agency's "permissible construction of the statute" must be given effect. *Chevron*, 467 U.S. at 843.

b. Petitioner offers three arguments as to why *Chevron* deference can never be applied to the Board's reading of Section 1101(a)(43)(A). All three of his arguments are inconsistent with this Court's case law, and petitioner's arguments would significantly curtail the Attorney General's authority to interpret the INA.

i. Petitioner's first argument is that deference to the Board's interpretation is fundamentally incompatible with the categorical approach, because "[t]he very function of the categorical approach in INA cases is to resolve any 'ambiguity' that resides in deportation provisions—and to 'err on the side of underinclusiveness.'" Pet. Br. 36 (brackets omitted) (quoting *Moncrieffe*, 133 S. Ct. at 1687, 1693). That argument is based on the same misunderstanding described above regarding the distinct steps of the categorical approach. See pp. 25-28, *supra*. The first step is to interpret the federal provision at issue. At the second step, a comparison is made between the federal provi-

sion and the state conviction, "presum[ing] that the conviction rested upon nothing more than the least of the acts criminalized, and then determin[ing] whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (brackets, citation, and internal quotation marks omitted). That "least of the acts" feature of the second step is what led the Court in *Moncrieffe* to say that the categorical approach resolves "ambiguity" in the alien's favor. See *id.* at 1686-1687 ("Moncrieffe's conviction could correspond to either the [Controlled Substances Act (CSA)] felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA."). But that inherent feature of the second step provides no reason to displace normal tools of statutory construction when interpreting the federal provision at step one; nor does it suggest that *Chevron* deference is somehow incompatible with that basic interpretive mission.

ii. Petitioner next argues that deference is precluded by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." Pet. Br. 38 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001)). That principle, he contends (*ibid.*), is a "tiebreaking rule[] of statutory construction" that must be given effect *before* the Court concludes that any ambiguity remains for the agency to resolve under *Chevron*. And once the tie is broken in the alien's favor, he argues, "there is, for *Chevron* purposes, no ambiguity in the statute for an agency to resolve." *Ibid.* (brackets omitted) (quoting *St. Cyr*, 533 U.S. at 321 n.45).

Petitioner is correct that this Court has recognized that certain interpretive principles must be applied to a statute before deciding whether any "gap" remains for the agency to fill under *Chevron*, 467 U.S. at 843. In *St. Cyr*, for instance, the Court applied the "presumption against retroactive legislation" in determining that Congress had not intended, under IIRIRA and the Antiterrorism and Effective Death Penalty Act, to retroactively eliminate certain avenues of discretionary relief for an alien who had pleaded guilty prior to the statutes' enactment. 533 U.S. at 316 (citation omitted). The government argued that the Court should defer to the Board's interpretation of IIRIRA, but the Court responded that such deference was unwarranted: "Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, * * * there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id.* at 321 n.45. The Court applied analogous reasoning in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), reading the INA to implicitly require a reasonable-time limitation on post-removal detention under principles of constitutional avoidance. See *id.* at 689 ("It is a cardinal principle of statutory interpretation * * * that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (brackets and internal quotation marks omitted). Petitioner argues that a similar order-of-operations applies here.

The proposition that petitioner invokes, however, is of a different order. Even the rule of lenity in *criminal* cases is not applicable unless there is a "grievous

ambiguity or uncertainty in the language and structure of the Act, * * * such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (brackets, citations, and internal quotation marks omitted). In the immigration context, any application of the analogous proposition must come only *after* the Attorney General has had an opportunity to interpret the relevant statutory provision—which is one of the "thing[s] from which aid can be derived," *ibid.*—and the courts have given appropriate deference to that interpretation. Any other approach would usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance.

Indeed, if petitioner were correct that even *Chevron*-step-two questions must always be answered in the alien's favor, it is hard to imagine when deference would *ever* apply to the Attorney General's interpretation of the INA: Under petitioner's, any dispute over the meaning of an INA provision would have to be resolved in the alien's favor unless the Board's contrary interpretation were unambiguously correct—in which case deference would be unnecessary. Yet this Court has consistently instructed that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Negusie*, 555 U.S. at 517 (quoting *Aguirre-Aguirre*, 526 U.S. at 425).

This Court's cases have thus applied standard principles of deference despite calls by aliens to resolve statutory ambiguities in their favor. For instance, in *Scialabba*, *supra*, the Court confronted a "Janus-faced" provision concerning immigrant visas that

could be read to support either the Board's interpretation or the respondents'. 134 S. Ct. at 2203 (opinion of Kagan, J.). Since both were "reasonable constructions," the Court explained, "*Chevron* dictates that a court [must] defer to the agency's choice." *Ibid.*; see *id.* at 2215 (Roberts, C.J., concurring in the judgment) (agreeing that *Chevron* deference was appropriate because "Congress did not speak clearly" and the Board's interpretation was "reasonable"); *id.* at 2217, 2219-2220 (Sotomayor, J., dissenting) (applying *Chevron* framework but finding statute unambiguous at step one). In *Judulang* v. *Holder*, 132 S. Ct. 476 (2011), after the Court invalidated as arbitrary and capricious the Board's approach to an INA provision governing a waiver of excludability and its application to grounds for deportation, the Court recognized the Board's prerogative on remand "to devise another" approach, observing that the alien's proposed approach "may not be the only alternative." *Id.* at 490. And in *Negusie*, the Court concluded that the provision at issue "ha[d] an ambiguity," 555 U.S. at 517, but did not then adopt the narrowing construction advocated by the alien. Instead, it remanded to give the agency an opportunity to adopt its own construction. *Id.* at 523-524. Those holdings cannot be reconciled with petitioner's argument.

Petitioner fares no better with his argument (Br. 39) that ambiguous immigration statutes must be interpreted in aliens' favor to "help[] ensure noncitizens understand when guilty pleas or other criminal convictions might subject them to removal." Petitioner cannot maintain that greater clarity is required here than in the criminal context, where only "grievous ambiguity" is resolved in a defendant's favor. And insofar as

petitioner claims that he lacked notice of the Board's position, the Court rejected a similar contention in *Judulang*. There, the alien argued that he had lacked adequate notice, when pleading guilty, that the Board would later adopt a construction of the INA that rendered him ineligible for discretionary relief from deportation. See Pet. Br. at 31, *Judulang*, *supra* (No. 10-694) ("The BIA's Change In Law Was Impermissibly Retroactive"); *id.* at 31-38. "To succeed on that theory," the Court explained, "Judulang would have to show, at a minimum, that in entering his guilty plea, he had reasonably relied on a legal rule from which [the relevant Board decisions] departed." 132 S. Ct. at 489 n.12. But "[t]he instability of the BIA's prior practice prevent[ed] Judulang from making th[at] showing." *Ibid.* Petitioner's fair-notice argument stands on even weaker ground in this case, given that the Board's *Rodriguez* and *V-F-D-* decisions had already put him on notice, before he pleaded guilty in 2009, that the Board read Section 1101(a)(43)(A) based on its plain language as applying to sexual crimes involving 16- and 17-year-old minors.

iii. Petitioner further argues (Br. 40-41) that principles of deference do not apply to the Board's interpretation of Section 1101(a)(43)(A) because the scope of that provision "determines criminal liability as well as immigration consequences." Criminal consequences may attach to certain misconduct when committed by (or with respect to) aliens previously convicted of aggravated felonies. Petitioner identifies three such crimes, see Pet. Br. 41 (citing 8 U.S.C. 1253(a)(1)), 1326(b)(2), and 1327). Because of those potential criminal applications, petitioner argues (Br. 42) that the Court should apply the criminal rule of lenity, which

"requires courts to resolve [any] ambiguity in favor of defendants." And he contends that, because Section 1101(a)(43)(A) "must mean the same thing in both its civil and criminal applications," the Court must resolve this case as if it arose in the criminal context, where the Board's "expansive construction is 'not relevant at all.'" Pet. Br. 42-43 (quoting *Abramski* v. *United States*, 134 S. Ct. 2259, 2274 (2014)).

Petitioner's argument is based on purported concerns about "inadequate notice of potential criminal liability." Pet. Br. 45 (brackets and citation omitted). Yet all three of the criminal provisions that are tied to the aggravated felony definition impose consequences only upon the commission of further, wrongful conduct in addition to the aggravated felony itself. Under 8 U.S.C. 1326(b)(2), an alien who illegally reenters the country following removal faces a higher maximum sentence if the "removal was subsequent to a conviction for commission of an aggravated felony." Under 8 U.S.C. 1253(a)(1), an alien who is subject to a final order of removal but "willfully" fails or refuses to depart the country, to present himself for removal, or to timely apply for necessary travel documents for removal, or an alien who conspires to thwart removal, may face a greater maximum sentence if the alien has been convicted of an aggravated felony. And 8 U.S.C. 1327 imposes criminal liability on "[a]ny person who knowingly aids or assists any alien" who is inadmissible by virtue of an aggravated felony conviction or inadmissible on national security grounds. Those provisions apply only to defendants whose conduct violates additional legal requirements.

Petitioner's argument is also out of all proportion to the role the INA's definition of "aggravated felony"

plays in the enforcement of the Nation's immigration laws. Overwhelmingly, the definition has meaningful application only in civil removal proceedings, where it is applied thousands of times annually as a ground for removal or a bar to discretionary relief. See Office of Immigration Statistics, Department of Homeland Security, *Annual Flow Report* at 6 (Dec. 2016) (more than 8000 removals and other departures in fiscal year 2016 involving aliens convicted of aggravated felonies).[40] By contrast, available statistics indicate that the definition does not play much, if any, role in prosecutions under the criminal provisions cited by petitioner. In fiscal year 2013, for instance, there were only 13 *total* convictions under 8 U.S.C. 1253 and only 27 *total* convictions under 8 U.S.C. 1327.[41] Convictions under the illegal reentry provision, 8 U.S.C. 1326, are far more frequent. Violation of that provision ordinarily carries a maximum sentence of two years, 8 U.S.C. 1326(a), which increases to 10 years under certain circumstances, 8 U.S.C. 1326(b)(1), (3), and (4). Yet even though Subsection (b)(2) authorizes up to a 20-year sentence for an alien who illegally reenters the country after being removed after conviction of an aggravated felony offense, the average sentence for illegal reentry in 2013 was 18 months and the median sentence was 12 months—both below the two-year generally authorized sentence. See U.S. Sent. Comm'n,

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[40] https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf.

[41] Data acquired from the Office of Justice Programs, Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics*, available at http://www.bjs.gov/fjsrc/tsec.cfm. The data do not indicate how often aggravated felony status was invoked in those cases.

Illegal Reentry Offenses 9 (Apr. 2015). Indeed, as the Sentencing Commission noted in its 2015 report, "*[o]nly two* of the 18,498 illegal reentry offenders sentenced in fiscal year 2013 received a sentence above ten years" based on the aggravated felony enhancement. *Id.* at 10 (emphasis added). The rare prospect that aggravated felony status may cause criminal liability or an enhanced sentence furnishes no basis for foreclosing *Chevron* deference to the Board's interpretation in the fundamentally different context of administrative removal proceedings.

Moreover, petitioner's argument runs headlong into this Court's precedents. In *United States* v. *O'Hagan*, 521 U.S. 642 (1997), the Court considered a criminal defendant's challenge to convictions that were based on his violation of Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 under two rules promulgated by the Securities and Exchange Commission. *Id.* at 647 (citing Rule 10b-5 and Rule 14e-3(a)). The Court upheld the convictions. See *id.* at 653, 666-667. The Court explicitly relied on *Chevron* deference to Rule 14e-3(a) in upholding the convictions based on Section 14(e). See *id.* at 666-667 ("A sole question is before us as to these convictions: Did the Commission * * * exceed its rulemaking authority under § 14(e) when it adopted Rule 14e-3(a) without requiring a showing that the trading at issue entailed a breach of fiduciary duty?"); see also *id.* at 673 ("Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, * * * we must accord the Commission's assessment 'controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.'") (brackets omitted) (quoting *Chevron*, 467 U.S. at 844).

The Court similarly applied *Chevron* deference in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), deferring to the Secretary of the Interior's definition of a provision, under the Endangered Species Act of 1973 (ESA), that made it unlawful to "take" any threatened or endangered species. *Id.* at 703-704. The respondents had argued "that the rule of lenity should foreclose any deference to the Secretary's interpretation of the ESA because the statute includes criminal penalties." *Id.* at 704 n.18. The Court rejected that contention, noting that it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Ibid.* The Court further observed that, even assuming the rule of lenity might be offended by inadequate notice from a regulation interpreting a statute with criminal as well as civil sanctions, the regulation at issue there had existed for two decades and gave "a fair warning of its consequences." *Ibid.*[42]

The Court also applied deference principles in *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), where the Court addressed whether,

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[42] In the same footnote in *Sweet Home*, the Court distinguished *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992), in which lenity was applied to a tax statute in a civil setting, where the statute "ha[d] criminal applications that carr[ied] no additional requirement of willfulness," *id.* at 517 (opinion of Souter, J.), and "where no regulation was present," *Sweet Home*, 515 U.S. at 704 n.18. See *Thompson/Center Arms*, 504 U.S. at 518 n.9 (opinion of Souter, J.) (declining "to defer to an agency interpretation contained in two longstanding Revenue Rulings" because "neither of the rulings * * * goes to the narrow question presented here"); see *id.* at 523 (Scalia, J., concurring in the judgment).

under the Fair Labor Standards Act of 1938, protection for an employee who "'filed any complaint' include[d] oral as well as written complaints within its scope." *Id.* at 4. In answering yes to that question, the Court observed that Congress had delegated "enforcement powers" to the Secretary of Labor and the Equal Employment Opportunity Commission, requiring the Court to "give a degree of weight to their views about the meaning of this enforcement language." *Id.* at 14-15. Both agencies had agreed that the statute covered oral complaints. *Id.* at 15. Since the agencies' "views [we]re reasonable" and "consistent with the act," the Court explained, "they consequently add force to our conclusion." *Id.* at 15-16 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Next, the Court addressed the defendant's argument that the statutory prohibition should be read narrowly under principles of lenity because "those who violate the antiretaliation provision * * * are subject to criminal sanctions." *Id.* at 16. Although the Court agreed that the rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context, no work remained for it to do: "[A]fter engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity here." *Ibid.*

Those decisions are fundamentally inconsistent with petitioner's argument that when an agency has been given authority, through rulemaking or adjudication, to administer and interpret a civil statute with potential criminal applications, principles of lenity must be applied to the *exclusion* of deference to an authoritative agency interpretation. Instead, they in-

dicate that the Court should apply lenity, where appropriate, only "*after* engaging in traditional methods of statutory interpretation"—including deference to the agency's reasonable construction of a statute. *Kasten*, 563 U.S. at 16 (emphasis added). Treating lenity as a tool of last resort in the immigration context is consistent with its application in the criminal context, where the rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). And it ensures as well that lenity comes into play only if, after other interpretive methods have been exhausted, "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Abramski*, 134 S. Ct. at 2272 n.10 ("The dissent would apply the rule of lenity here because the statute's text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test.").

Petitioner seeks (Br. 44) to distinguish *Sweet Home*—though not *O'Hagan* or *Kasten*—on the ground that the ESA regulation at issue in that case had been promulgated decades earlier, such that "the regulation gave ample prospective notice of the Act's reach." By contrast, petitioner argues (Br. 45), the agency views at issue here were expressed by the Board in 2015, creating the possibility that "criminal defendants [might be] prosecuted for acts committed prior to 2015." Allowing the Board to define the scope of Section 1101(a)(43)(A), he asserts, would thus leave de-

fendants "with the sort of 'inadequate notice of potential criminal liability' that [*Sweet Home*] itself suggested would 'offend the rule of lenity.'" *Ibid.* (brackets omitted) (quoting *Sweet Home*, 515 U.S. at 704 n.18).

Whatever retroactivity or notice concerns a hypothetical defendant might reasonably raise in a criminal proceeding regarding the application of a Board decision to pre-decision conduct, *petitioner* can raise no such concerns: He is charged here with removability in a civil proceeding. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country."); *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (alien had no right to be "forewarned of all the consequences of his criminal conduct" and was deportable based on a prior conviction that "was not [a] ground for deportation at the time he committed the offense"). If petitioner were to reenter the country illegally following his removal and were prosecuted for doing so—and in the remote possibility that his aggravated felony conviction even played a role, see pp., 46-48, *supra*—petitioner could hardly claim lack of fair notice that his California conviction was an aggravated felony.

Finally, the real-world impact of accepting petitioner's argument could be profound. The list of aggravated felonies, by itself, contains numerous undefined terms such as "purely political offense," "prostitution business," and "commercial advantage." See 8 U.S.C. 1101(a)(43)(F), (K)(i), and (K)(ii). But the Board's authority to make a far broader range of decisions currently assigned to the agency by statute could also be affected, including: whether an alien is

removable because he has participated in or encouraged smuggling (Section 1227(a)(1)(E)), because he has been convicted of a "crime involving moral turpitude" or any other criminal-related ground of removability (Section 1227(a)(2)), because he has committed document fraud or misuse (Section 1227(a)(3)), or because he poses a risk to national security or public safety (Section 1227(a)(4)). All of those determinations have potential criminal consequences. See 8 U.S.C. 1253(a)(1) (imposing up to ten-year sentence for a willful failure to depart "if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a)"). And if petitioner's argument were pressed to its logical extreme, the Board could similarly be deprived of deference over all security and terrorism-related grounds of inadmissibility, 8 U.S.C. 1182(a)(3), since helping an alien who is inadmissible for that reason is a criminal offense. See 8 U.S.C. 1327; see also 8 U.S.C. 1326(b)(3) (mandatory sentence for illegal entry by alien who is excludable on terrorism-related grounds).

Petitioner's theory could thus strip the Board of discretion to interpret bedrock immigration provisions —including those related to keeping terrorists from entering or remaining in the country. Some of those bedrock provisions are applied thousands of times a year. Rather than endorse such a radical reworking of our Nation's immigration system, this Court should instead address concerns about the retroactive application of Board decisions to criminal proceedings (if such a scenario ever arose) on an as-applied basis.

c. Petitioner also argues (Br. 45) that even if *Chevron* applies, the Board's interpretation is undeserving of deference because the Board "committed three ba-

sic legal errors in reaching its conclusion." See Pet. Br. 45-48. Petitioner is wrong as to all three.

i. Petitioner argues that the Board, by declaring itself "not prepared to hold that a 16- or 17-year-old categorically cannot be the victim of sexual abuse" under Section 1101(a)(43)(A), Pet. Br. 46 (quoting Pet. App. 34a), erroneously focused on "the *worst* conduct the statute could cover, instead of focusing on 'the *least* of the acts criminalized,'" *id.* at 47 (brackets omitted) (quoting *Moncrieffe*, 133 S. Ct. at 1684). That argument yet again reflects petitioner's misunderstanding concerning the distinct steps of the categorical approach. See pp. 25-28, *supra*. The "least of the acts" analysis applies at step two, to determine whether the state offense falls under the federal provision at issue. But the Board acted properly when, at step one, it declined to construe Section 1101(a)(43)(A) in a manner that would have ruled out all sexual crimes involving 16- and 17-year-old minors. And notably, petitioner does not claim that such crimes may never qualify as "sexual abuse of a minor."

ii. Petitioner contends (Br. 47) that the Board improperly "sought guidance from a procedural statute and non-criminal sources to determine elements of the generic definition of 'sexual abuse of a minor,'" whereas "the categorical approach requires adjudicators to confine themselves to substantive criminal laws." Yet the most common source consulted by this Court when construing federal provisions at step one is the dictionary. See, *e.g.*, *Torres*, 136 S. Ct. at 1625 & nn.3 & 4; *Mellouli*, 135 S. Ct. at 1991; *Kawashima*, 132 S. Ct. at 1172; *Carachuri-Rosendo*, 560 U.S. at 574; *Johnson*, 559 U.S. at 139-140; *Lopez*, 549 U.S. at 53-54. The Board pointed to the definition of "sexual

abuse" contained in 18 U.S.C. 3509(a)(8) merely because it provided "useful guidance" for determining the term's commonsense, contemporary meaning. Pet. App. 30a. As the Board noted, that federal provision is consistent as well with the term's dictionary definition. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996 (citing *Black's* 1375).

iii. Petitioner argues (Br. 47) that the Board at least should have resolved any lingering ambiguity in his favor, either under "the presumption that deportation statutes should be construed narrowly or [under] the criminal rule of lenity." But the factual premise for that argument is erroneous: The Board had no occasion to apply those last-resort canons because it did not find, "after considering text, structure, history, and purpose, [that] there remain[ed] a grievous ambiguity or uncertainty in the statute," such that it was forced to "guess as to what Congress intended." *Castleman*, 134 S. Ct. at 1416 (citation omitted).

B. Step Two: Petitioner's State Conviction Categorically Qualifies As Sexual Abuse Of A Minor

Petitioner's conviction under California Penal Code § 261.5(c) categorically falls under the federal provision at issue, "sexual abuse of a minor," both under a plain-language interpretation and under the Board's construction. The California statute criminalizes "an act of sexual intercourse" with "a person under the age of 18" if the minor "is more than three years younger than the perpetrator." *Id.* § 261.5(a) and (c). Even the "least of the acts criminalized" by that law involve illegal sexual activity directed at a person younger than 18 years old. *Moncrieffe*, 133 S. Ct. at 1684 (brackets and internal quotation marks omitted). And every violation also necessarily involves "a mean-

ingful age difference" of at least three years between the perpetrator and the victim. Pet. App. 40a. Petitioner's state offense is therefore an aggravated felony under Section 1101(a)(43)(A).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

This table lists statutory rape offenses according to the age at which sexual contact is no longer illegal (*i.e.*, the age of consent) and also indicates whether the offense requires a differential in age between the perpetrator and victim.

18 YEARS		*Age Differential*
Arizona Ariz. Rev. Stat. Ann.	§ 13-1405 (Supp. 2016)	2 years § 13-1407(F) (2010)
California Cal. Penal Code	§ 261.5(a) and (b) (West 2014)	None
	§ 261.5(a) and (c) (West 2014)	3 years
Colorado Colo. Rev. Stat.	§ 18-3-404(1.5) (2015)	None
Delaware Del. Code Ann. tit. 11	§ 768 (2015)	None
	§ 770(a)(2) (2015)	12 years
Florida Fla. Stat. Ann.	§ 794.05(1) (West Supp. 2017)	6 years
Idaho Idaho Code Ann.	§ 18-6101(2) (2016)	3 years

North Dakota N.D. Cent. Code	§§ 12.1-20-05(1) (2012), 14-10-01 (2009)	None
Oregon Or. Rev. Stat.	§§ 163.315(1)(a), 163.415(1)(a)(B) (2015)	3 years § 163.345(1) (2015)
Tennessee Tenn. Code Ann.	§ 39-13-506(a) (2014)	4 years
	§ 39-13-506(b)(2) (2014)	5 years
	§ 39-13-506(c) (2014)	10 years
Utah Utah Code Ann.	§ 76-5-401.2(2)(a)(i) (LexisNexis Supp. 2016)	7 years
	§ 76-5-401.2(2)(a)(ii) (LexisNexis Supp. 2016)	10 years
Virginia Va. Code Ann.	§ 18.2-371 (Supp. 2016)	1 day
Wisconsin Wis. Stat. Ann.	§§ 948.01(1) (West Supp. 2016), 948.09 (West 2005)	None

17 YEARS		*Age Differential*
Illinois 720 Ill. Comp. Stat. Ann.	§ 5/11-1.50(b) (West Supp. 2016)	None
	§ 5/11-1.50(c) (West Supp. 2016)	
	§ 5/11-1.60(d) (West Supp. 2016)	5 years
Louisiana La. Rev. Stat. Ann.	§ 14:80 (2012)	4 years
Missouri Mo. Ann. Stat.	§ 566.034 (West Supp. 2016)	4 years
	§ 566.064 (West Supp. 2016)	
New Mexico N.M. Stat. Ann.	§ 30-9-11(G)(1) (Supp. 2016)	4 years
New York N.Y. Penal Law	§§ 130.05(3)(a) (McKinney Supp. 2016), 130.20(1) (McKinney 2009)	None
	§§ 130.05(3)(a) (McKinney Supp. 2016), 130.25(2) (McKinney 2009)	4 years

Texas Tex. Penal Code Ann.	§ 22.011(a)(2) and (c)(1) (West 2011)	3 years § 22.011(e)(2)(A) (West 2011)
Wyoming Wyo. Stat. Ann.	§ 6-2-316(a)(iv) (2015)	4 years

16 YEARS		*Age Differential*
Alabama Ala. Code	§ 13A-6-62(a)(1) (LexisNexis 2015)	2 years
	§ 13A-6-64(a)(1) (LexisNexis 2015)	None
Alaska Alaska Stat.	§ 11.41.436(a)(1) (2014)	4 years
Arkansas Ark. Code Ann.	§ 5-14-127(a)(1) (2013)	4 years
Connecticut Conn. Gen. Stat. Ann.	§ 53a-71(a)(1) (West Supp. 2016)	3 years

District of Columbia D.C. Code	§§ 22-3001(3) (LexisNexis 2012), 22-3008 (LexisNexis Supp. 2016)	4 years
	§§ 22-3001(3) (LexisNexis 2012), 22-3009 (LexisNexis Supp. 2016)	
Georgia Ga. Code Ann.	§ 16-6-3(a) and (b) (2011)	None
	§ 16-6-3(a) and (c) (2011)	4 years
	§ 16-6-4(a) and (b)(1) (2011)	None
	§ 16-6-4(a) and (b)(2) (2011)	4 years
Hawaii Haw. Rev. Stat. Ann.	§ 707-730(1)(c) (LexisNexis 2016)	5 years
Indiana Ind. Code Ann.	§ 35-42-4-9 (LexisNexis Supp. 2016)	4 years § 35-42-4-9(e) (LexisNexis Supp. 2016)

Iowa Iowa Code Ann.	§ 709.4(1)(b)(3)(d) (West Supp. 2016)	4 years
Kansas Kan. Stat. Ann.	§ 21-5504(a)(3) (Supp. 2015)	None
	§ 21-5506(a) and (b)(1) (Supp. 2015)	
Kentucky Ky. Rev. Stat. Ann.	§§ 510.020(3)(a), 510.060(1)(b) (LexisNexis 2014)	5 years
Maine Me. Rev. Stat. Ann. tit. 17-A	§ 254(1)(A) (West Supp. 2016)	5 years
	§ 254(1)(A-2) (West Supp. 2016)	10 years
Maryland Md. Code Ann. Crim. Law	§ 3-307(a)(4) and (5) (LexisNexis Supp. 2016)	5 years
	§ 3-308(b)(2) and (3) (LexisNexis Supp. 2016)	4 years
Massachusetts Mass. Ann. Laws ch. 265	§ 23 (LexisNexis 2010)	None

Michigan Mich. Comp. Laws Ann.	§ 750.520d(1)(a) (West Supp. 2016)	None
Minnesota Minn. Stat. Ann.	§ 609.344.1(b) (West Supp. 2016)	2 years
	§ 609.345.1(b) (West Supp. 2016)	4 years
Mississippi Miss. Code Ann.	§ 97-3-65(1)(a) (West 2011)	3 years
Montana Mont. Code Ann.	§§ 45-5-501(1)(a)(ii)(D), 45-5-503(1) (2015)	None
	§§ 45-5-501(1)(a)(ii)(D), 45-5-503(3)(a) (2015)	4 years
Nebraska Neb. Rev. Stat. Ann.	§ 28-319(1)(c) (LexisNexis 2015)	3 years
	§ 28-319.01(1)(b) (LexisNexis 2015)	9 years
Nevada Nev. Rev. Stat. Ann.	§§ 200.364(6), 200.368 (LexisNexis Supp. 2016)	4 years

New Hampshire N.H. Rev. Stat. Ann.	§ 632-A:3(II) (LexisNexis 2015)	4 years
	§ 632-A:4(I)(b) (LexisNexis 2015)	5 years
	§ 632-A:4(I)(c) (LexisNexis 2015)	None
New Jersey N.J. Stat. Ann.	§ 2C:14-2(c)(4) (West 2015)	4 years
North Carolina N.C. Gen. Stat.	§ 14-27.25 (2015)	6 years
	§ 14-27.30 (2015)	
Ohio Ohio Rev. Code Ann.	§ 2907.04(A) (LexisNexis 2014)	2 years
Oklahoma Okla. Stat. Ann. tit. 21	§ 1111.A.1 (West Supp. 2017)	2 years § 1112 (West 2015)
Pennsylvania 18 Pa. Cons. Stat. Ann.	§ 3122.1 (West 2015)	4 years
	§ 3123(a)(7) (West 2015)	
	§ 3125(a)(8) (West 2015)	

Rhode Island R.I. Gen. Laws	§ 11-37-6 (2002)	2 years
South Carolina S.C. Code Ann.	§ 16-3-655(C) (2015)	3 years
South Dakota S.D. Codified Laws	§ 22-22-1(5) (Supp. 2016)	3 years
Vermont Vt. Stat. Ann. tit. 13	§ 3252(c) (2009)	3 years
Washington Wash. Rev. Code Ann.	§ 9A.44.079 (West 2015)	4 years
	§ 9A.44.089 (West 2015)	
West Virginia W. Va. Code Ann.	§ 61-8B-5(a)(2) (LexisNexis 2014)	4 years

APPENDIX B

1. 8 U.S.C. 1101(a)(43) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

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[5] So in original. Probably should be preceded by "is".

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child,

or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

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[6] So in original. Probably should be followed by a semicolon.

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

2. 8 U.S.C. 1227(a)(1)-(4) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on

May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub. L. 104-208, div. C, title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy

or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any

State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is deportable.

3. 8 U.S.C. 1253(a)(1)-(2) provides:

Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who—

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) **Exception**

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

4. 8 U.S.C. 1326(a)-(b) provides in pertinent part:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission;

or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

* * * * *

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

* * * * *

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

5. 8 U.S.C. 1327 provides:

Aiding or assisting certain aliens to enter

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or

persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

6. 18 U.S.C. 2243 provides:

Sexual abuse of a minor or ward

(a) OF A MINOR.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) OF A WARD.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) DEFENSES.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) STATE OF MIND PROOF REQUIREMENT.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

7. 18 U.S.C. 3509(a) provides:

Child victims' and child witnesses' rights

(a) DEFINITIONS.—For purposes of this section—

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be—

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(10) the term "sex crime" means an act of sexual abuse that is a criminal act;

(11) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(12) the term "child abuse" does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

8. Cal. Penal Code § 261.5(a)-(d) (West 2014) provides:

Unlawful sexual intercourse with person under 18; age of perpetrator; civil penalties

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The federal government and all states, including California, have statutes prohibiting adults from having sex with persons under 16 years old or younger teenagers. *See, e.g.*, Cal. Penal Code § 261.5(d).[1] But a handful of states have *additional* statutes, such as Cal. Penal Code § 261.5(c), making it a crime for a 21-year-old to have consensual sex with a person who is almost 18. The question presented is whether a conviction under one of these outlier statutes constitutes the "aggravated felony" of "sexual abuse of a minor."

All signs point to no. The federal statute criminalizing "sexual abuse of a minor," the Model Penal Code, and the vast majority of states do not deem the least culpable conduct under Cal. Penal Code § 261.5(c) to be illegal, much less a serious felony. Six of the seven states that do criminalize that conduct do not treat it as "abuse." And the ordinary understanding of sexual "abuse" does not encompass consensual sex between two partners who are 21 and almost 18.

The Government asks this Court to ignore all these signals of statutory meaning in favor of an

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[1] *See also* Resp. Br. 4a-9a; Petr. Br. 34 & n.9; Colo. Rev. Stat. § 18-3-402(1)(d); Del. Code Ann. tit. 11, § 771(a)(1); Fla. Stat. § 800.04(4)(a); 720 Ill. Comp. Stat. 5/11-1.40(a)(1); La. Stat. Ann. § 14:42(A)(4); Mo. Rev. Stat. § 566.067; N.Y. Penal Law §§ 130.30(1), 130.45(1); Tenn. Code Ann. §§ 39-13-522, -506(b)(1); Tex. Penal Code § 22.021; Utah Code Ann. §§ 76-5-401.1, -402.1; Wyo. Stat. § 6-2-314(a)(i).

expansive definition of "sexual abuse of a minor" stitched together from *Black's Law Dictionary*. This Court should refuse that request. The federal statute criminalizing "sexual abuse of a minor"—which Congress amended simultaneously with enacting the identically worded INA provision here, and which prohibits consensual sex only when the younger partner is under 16—is plainly more instructive than *Black's Law Dictionary*. And when the INA designates an aggravated felony without providing a readily apparent federal definition, surveying criminal law provides a reliable method of discerning the parameters of the generic offense Congress had in mind. This is so even when state laws are not entirely uniform and regardless of whether the crime has common-law roots.

At any rate, the Government's proposed definition gets it nowhere. According to the Government, the phrase "sexual abuse of a minor" encompasses any "sexual activity" with a minor that a jurisdiction deems "illegal." Resp. Br. 17. But consensual "sexual activity" is not the same thing as "sexual *abuse*." Consensual sex constitutes "abuse" solely because of the partners' ages only when the younger partner is under 16. And the word "illegal" cannot bridge the gap between "activity" and "abuse." A generic crime "must have some uniform definition" that does not fluctuate according to what each jurisdiction happens to prohibit. *Taylor v. United States*, 495 U.S. 575, 592 (1990).

Nor is there any basis for deferring to the BIA's construction of 8 U.S.C. § 1101(a)(43)(A). This Court's precedent does not require—or even allow—considering the BIA's views before applying

traditional canons of statutory construction. One such canon is the rule that ambiguities in deportation laws must be construed against the Government. More fundamentally, *Chevron* deference may not eclipse the rule of lenity where, as here, a statute has criminal applications. And even if the statute were ambiguous within the meaning of *Chevron*, it still would not matter. The BIA's analysis is unreasonable in multiple ways the Government hardly defends.

In short, whatever path this Court follows, all roads lead to reversal.

ARGUMENT

I. This Court May Decide This Case by Asking Solely Whether Cal. Penal Code § 261.5(c) Contains an Element That Is Broader Than the Generic Definition of "Sexual Abuse of a Minor."

The BIA and the Sixth Circuit set out here to determine only whether the age-related components of Cal. Penal Code § 261.5(c) are broader than the generic crime "sexual abuse of a minor." Pet. App. 12a-15a, 40a; *see also United States v. Rangel-Castaneda*, 709 F.3d 373, 381 (4th Cir. 2013) (Wilkinson, J.) ("[R]ather than set out what 'sexual abuse of a minor' *can* mean, we simply note one particular thing that it *cannot* mean."). The Government endorsed the same approach below. It disclaimed any need to make "findings on issues the decision of which is unnecessary to the result[]" in favor of fleshing out the meaning of "sexual abuse of a minor" through a "case-by-case methodology." Resp. CA6 Br. 24-26 (citation omitted).

The Government now takes the opposite view. It criticizes petitioner for declining to provide a

comprehensive definition of "sexual abuse of a minor." Resp. Br. 23. The Government also maintains the age-related elements of the generic crime here must be established in a vacuum, before considering how these elements relate to the least culpable acts criminalized under the state statute of conviction. *Id.* 25. The Government is wrong on both counts.

1. It is perfectly acceptable to construe only those elements of a generic crime that are necessary to a case's disposition. In *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), for instance, the Court considered whether a state-law conviction was one "relating to a controlled substance" under the INA. Because the state statute covered drugs not classified under federal law as "controlled substances," the Court held the state statute was overbroad—leaving undecided what exactly it would mean for a crime to "relate to" a controlled substance. *Id.* at 1991.

Indeed, despite its rhetoric, the Government itself offers only a partial definition of "sexual abuse of a minor." The Government does not tackle whether the crime requires the defendant to *knowingly* commit the proscribed conduct. *See Rangel-Perez v. Lynch*, 816 F.3d 591, 604-05 (10th Cir. 2016) (holding such *mens rea* is required). Nor does the Government say whether "sexual abuse of a minor" requires physical contact. *See In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-96 (B.I.A. 1999) (holding by bare majority that contact is not required).

Incrementalism is as it should be. As with other legal methodologies, the categorical approach does not require this Court to decide potentially difficult issues the parties do not contest and that do not bear on a case's outcome. Once this Court concludes a

state statute has an element that is broader than the relevant generic crime, it may cease its analysis.

2. When assessing whether a state statute has an element that is broader than its generic counterpart, it is likewise permissible to find overbreadth without fully defining the decisive element of the generic crime. The key question, after all, is how the state statute "compare[s]" to the generic crime. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). As this Court has explained, it "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, *and then* determine whether even those facts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (alterations in original) (emphasis added) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)); *see also, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (courts should "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime]"). There is nothing wrong with taking a minimalist approach to this inquiry.

Leocal v. Ashcroft, 543 U.S. 1 (2004), illustrates the point. This Court held there that a state statute must require a "higher degree of intent than negligent or merely accidental conduct" to fall within the definition of a "crime of violence" under the INA. *Id.* at 9-11. Because the state DUI law at issue did not require even that low level of *mens rea*, the Court expressly declined to decide whether "*reckless* use of force" is enough. *Id.* at 13.

As should be apparent by now, decisions like *Leocal* do not improperly "conflate[] the distinct steps of the categorical approach," Resp. Br. 25. Such

limited rulings simply conserve judicial resources by leaving hard problems concerning the outer boundaries of generic crimes for future cases, where those boundaries can be litigated on concrete records by parties with direct stakes in the outcomes. This Court, of course, is always free to decide more than is necessary to resolve a case. But the categorical approach does not require it.[2]

II. Cal. Penal Code § 261.5(c) Is Broader Than the Generic Crime of "Sexual Abuse of a Minor."

The Government does not dispute that the least culpable conduct under Cal. Penal Code § 261.5(c)—consensual sex between someone who just turned 21 and someone who is almost 18—is legal under the federal statute prohibiting "sexual abuse of a minor," the Model Penal Code, and the vast majority of state criminal codes.[3] But the Government argues (A) that the nationwide consensus that the conduct here does not constitute "statutory rape" tells us nothing about when consensual sex constitutes "sexual abuse of a

---

[2] Another example underscores the folly of the Government's position. Imagine a state prohibited conduct under a nondivisible forgery statute that no other state criminalized. Under the Government's approach, a court would have to pin down all of the elements of generic forgery to decide the case, even though it would be perfectly obvious that convictions under the state statute would not qualify regardless of what those elements might be. There is no reason to require that academic exercise.

[3] The Government notes that two states that do not criminalize the least culpable conduct now did so in 1996. Resp. Br. 29 n.37. But there is no meaningful difference between a consensus of 41 states and one of 43 states.

minor" and (B) that other indicia of congressional intent suggest that the conduct Cal. Penal Code § 261.5(c) prohibits categorically falls within Section 1101(a)(43)(A). Both arguments are mistaken.

A. Multi-Jurisdictional Analysis

When multi-jurisdictional surveys have supported the Government's interpretation of one of the INA's "aggravated felony" provisions, the Government has maintained that such surveys provide the best window into Congress's understanding of generic crimes. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), for example, the Government "presented [this Court] with a comprehensive account of the law of all States and federal jurisdictions" and urged this Court to construe the INA consistent with that consensus. *Id.* at 190. The BIA regularly consults multi-jurisdictional surveys as well. Indeed, just two months ago, the BIA held that "[b]ecause the majority of States, the Model Penal Code, and the Federal statute included the foregoing elements in their definition of perjury when Congress enacted section 101(a)(43)(S) of the Act, . . . this definition also embodies the level of criminal liability that Congress intended when it added the offense of perjury to the Act in 1996." *In re Alvarado*, 26 I. & N. Dec. 895, 901 (B.I.A. 2016).

Faced here, however, with a multi-jurisdictional survey that dictates a narrower reading of the INA than it would prefer, the Government contends for various reasons that a multi-jurisdictional survey sheds no light on the meaning of "sexual abuse of a minor." The Government is incorrect.

1. The Government first argues that a multi-jurisdictional analysis is irrelevant because laws regulating "statutory rape"—the type of "sexual abuse" at stake here—"vary considerably in their particulars." Resp. Br. 18. This is a strange argument. The whole purpose of a multi-jurisdictional analysis is to derive a "uniform definition" when there is no readily apparent federal definition and states define a crime in "many different ways." *Taylor v. United States*, 495 U.S. 575, 580, 592 (1990). Accordingly, this Court has repeatedly held that multi-jurisdictional surveys control where, as here, jurisdictions have divergent definitions of the crime at issue but a consensus can be discerned regarding the particular elements at issue. *See* Petr. Br. 15-17, 23-24 (discussing cases).

Contrary to the Government's suggestion, this does not mean that a state statute falls within a generic offense only if it constitutes the "lowest common denominator" of state offenses, Resp. Br. 26. The task is simply to determine whether the state statute of conviction "criminalizes conduct that *most* other States would not consider" illegal under their comparable statutes. *Duenas-Alvarez*, 549 U.S. at 191 (emphasis added); *see also Taylor*, 495 U.S. at 598 (courts should evaluate how the crime is defined "in the criminal codes of *most* States" (emphasis added)). Here, 43 states treat the least culpable acts criminalized under Cal. Penal Code § 261.5(c) as legal. *See* Pet. App. 66a-67a. And 32 states—along with federal law and the Model Penal Code—set the age of consent in their statutory rape laws at 16, *Rangel-Castaneda*, 709 F.3d at 377-78. This "large majority" is "too extensive to reject." *Id.* at 379-80.

2. The Government next contends that the multi-jurisdictional consensus here does not illuminate the meaning of Section 1101(a)(43)(A) because the crime "sexual abuse of a minor" does not have "common law roots." Resp. Br. 15, 23-24. This argument rests on a faulty premise. When Congress criminalized "sexual abuse of a minor" in 18 U.S.C. § 2243, it explained that the statute codified the "common law" offense of "statutory rape." H.R. Rep. No. 99-594, at 7 (1986); *see also* Wayne R. LaFave, *Criminal Law* § 17.4(c), at 920 (5th ed. 2010) ("statutory rape" is "encompassed within the common law of the United States").

At any rate, there is nothing magical about common-law roots. A multi-jurisdictional survey is designed to discern the "generally accepted *contemporary* meaning" of a crime—on the theory that this definition best approximates what Congress had in mind when making it a predicate for deportation or a sentencing enhancement. *Taylor*, 495 U.S. at 596-98 (emphasis added). It makes no difference, when discerning the "generally accepted contemporary meaning" of a crime, whether that crime has common-law roots. All that matters is whether it is possible—as it is here with respect to statutory rape—to identify a nationwide consensus regarding the pertinent elements of the offense.

Were the relevance of multi-jurisdictional surveys limited to crimes with common-law roots, serious practical problems would arise. The INA references several offenses that were not crimes at common law. To name a few: "failure to appear by a defendant for service of sentence"; "trafficking in vehicles the identification numbers of which have been altered"; and "child abuse." 8 U.S.C.

§ 1101(a)(43)(Q), (R); *id.* § 1227(a)(2)(E)(i). Courts have productively used multi-jurisdictional surveys to construe such provisions, noting that the designated crimes have "existed long enough to have 'accumulated' legal tradition and certain 'cluster[s] of ideas.'" *Ibarra v. Holder*, 736 F.3d 903, 914 (10th Cir. 2013) (alteration in original) (citation omitted) (construing "child abuse"). If this approach were no longer appropriate, courts would lack meaningful guideposts or constraints. And it would be difficult for lawyers or anyone else to predict the definitions of generic crimes or even what sources might be relevant to figuring them out. *See* Petr. Br. 26-29.

The Government protests that "this Court has often resolved categorical-approach cases"—"particularly where the federal provision at issue does not use a common law term"—without consulting multi-jurisdictional analyses. Resp. Br. 24. But none of the cases the Government cites involved construing a generic crime. Rather, four of the five cases concerned crimes defined by cross-reference. *See Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Lopez v. Gonzales* 549 U.S. 47 (2006); *Leocal*, 543 U.S. 1.[4] The remaining case involved language referring to the circumstances under which a given crime might be committed (whether it involved the

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[4] In *Carachuri-Rosendo* and *Lopez*, the Court consulted words ("illicit trafficking") outside of the cross-reference but only to verify the Court's construction of the cross-reference—much like how the Court has double-checked its analysis in other cases against the commonsense meaning of the umbrella term "aggravated felony." *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1689.

use of "physical force"), not a particular generic crime itself. *See Johnson*, 559 U.S. at 135 (quoting 18 U.S.C. § 924(e)(2)(B)(i)). Multi-jurisdictional surveys would serve no useful purpose in those contexts.

3. Finally, the Government claims that using multi-jurisdictional analyses can be too "difficult and burdensome." Resp. Br. 28. Yet the Government does not dispute that multi-jurisdictional surveys are readily available from a variety of sources. *See* Petr. Br. 26. For rare cases where they are not, the Government acts as though "immigration judges" and "courts" must conduct analyses on their own. Resp. Br. 30. Not so. As the party seeking deportation, the Government should—and has repeatedly shown it can—conduct the pertinent analyses itself. *See, e.g.*, *Duenas-Alvarez*, 549 U.S. at 190.

The Government similarly suggests that consulting a multi-jurisdictional analysis as petitioner urges here "would require a new 50-State survey for each state offense." Resp. Br. 28. This suggestion is also mistaken. Holding that convictions under Cal. Penal Code § 261.5(c) do not constitute "sexual abuse of a minor" would make clear that convictions under the six other state laws proscribing the same conduct are also excluded from the INA's reach. Or, if this Court prefers, it could hold, as the Fourth Circuit has, that the consensus under federal and state law that the age of consent for purposes of statutory rape is 16 excludes all other such laws with higher cutoffs. *Rangel-Castaneda*, 709 F.3d at 377-78. Either way, the multi-jurisdictional survey here enables this Court not only to resolve this case but also to provide meaningful guidance with respect to other state laws.

B. Other Interpretive Tools

The Government maintained for years that Section 1101(a)(43)(A) is "ambiguous." *See, e.g.*, Resp. CA6 Br. 15-16; Br. in Opp. 10, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745). It now contends, however, that the "plain language" of the statute has a meaning never previously discerned by any litigant or court in the two decades the subsection has been on the books. According to the Government, the crime "sexual abuse of a minor" encompasses all conduct "that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." Resp. Br. 15, 17. Even if the Government were correct that the meaning of "sexual abuse of a minor" turned on nothing more than the text and structure of the INA, the Government's proposed definition still would miss the mark.

1. The Government's proposal to cover all illegal sexual "activity" involving persons under 18 fails to account for the key statutory term in this case: "abuse." As petitioner has noted, consensual sex between a 21-year-old and someone just shy of 18 is not typically thought of as sexual "abuse." Petr. Br. 30. Indeed, only *one* state characterizes it as such. *Id.* 21.

The Government responds, citing *Taylor*, that it does not matter how states "label" the conduct at issue. Resp. Br. 30. But this is not a case, like *Taylor*, where certain jurisdictions simply use different nomenclature. *See Taylor*, 495 U.S. at 591. California and the other jurisdictions criminalizing the conduct at issue *do* use the term "sexual abuse." But they reserve the term for sexual acts involving children

under 16 (or where offenders hold positions of authority over victims). *See* Petr. Br. 20-21, 30-31.

Black's Law Dictionary—the primary source the Government uses to formulate its definition of "sexual abuse of a minor"—is not to the contrary. The Government notes that *Black's* defines "sexual abuse" to include "[i]llegal sex acts performed against a minor" and the word "minor" as someone under 18. Resp. Br. 16 (citing *Black's Law Dictionary* 997, 1375 (6th ed. 1990)). But this still leaves unresolved what the word "illegal" means in the context of consensual sex. That question turns on the prevailing "age of consent." *Black's* did not define that term in the edition the Government cites, but it now clarifies that the term "usually" means "16 years." *Black's Law Dictionary* 73 (10th ed. 2014).

2. Insofar as the Government intends the word "illegal" in its proposed definition to turn here not on the *typical* age of consent but instead on the designated age in the state (or foreign country) where the conviction occurred, then its proposed definition would be unacceptable for another reason. It would flout the categorical approach's basic precept that a generic offense must "have some uniform definition" that does not "depend on the definition adopted by the State of conviction." *Taylor*, 495 U.S. at 590, 592.

What is more, using the word "illegal" to define Section 1101(a)(43)(A)'s coverage would sweep in conduct that even the states with the most expansive conceptions of statutory rape deem mere misdemeanors. For instance, two states consider it a misdemeanor for two 17-year-olds to have consensual sex. *See* Cal. Penal Code § 261.5(b); Wis. Stat. §§ 948.01(1), 948.09; *see also In re Interest of J.F.K.*,

No. 2016AP941, 2016 WL 7471603 (Wis. Ct. App. Dec. 28, 2016). Applying the word "illegal" literally would deem such minor offenses "aggravated felonies." Yet this is exactly the kind of counterintuitive construction of "aggravated felony" this Court has deemed "fundamental[ly] flaw[ed]." *Moncrieffe*, 133 S. Ct. at 1689; *see also* Petr. Br. 32-33 (elaborating on this point).

The Government counters that the INA designates some offenses as aggravated felonies that, measured against murder and rape, are "comparatively minor." Resp. Br. 35 (quotation marks and citation omitted). But that does not respond to this Court's admonition that "the English language tells us not to expect" conduct to be classified as an "aggravated felony" that is *legal* under federal law and the vast majority of state criminal codes—and is a *misdemeanor* the two states that bother to prohibit it. *Carachuri-Resendo*, 560 U.S. at 575.

Even as to the comparison to "murder and rape," the Government's argument lacks force. The generic crime "sexual abuse of a minor" is listed *in the same subsection* as those offenses. *See* 8 U.S.C. § 1101(a)(43)(A). Therefore, noting that crimes referenced in *other subsections* are "comparatively minor" does not dispel the inference that Congress must have thought "sexual abuse of a minor" covered quite egregious conduct to warrant placing it in a triplet with murder and rape. Petr. Br. 31-32.

3. The Government's new definition of "sexual abuse of a minor" also fails to come to grips with 18 U.S.C. §§ 2243(a) and 2241(c), which together criminalize what Congress called "sexual abuse of a minor" at the time it enacted Section 1101(a)(43)(A).

See Petr. Br. 19. If this Court felt the need to offer a comprehensive, "plain language" definition of the term "sexual abuse of a minor," these provisions—not the Government's proposal—would provide the most sensible definition. *See id.* 18 n.3; Amicus Br. of Immigrant Defense Project et al. 4-18.

The Government persuaded the Sixth Circuit (and initially told this Court) that Section 2243(a) could not inform the meaning of Section 1101(a)(43)(A) because Section 2243 currently does not cover sexual acts against children under 12. *See* Pet. App. 13a; Resp. CA6 Br. 17-18; BIO 14. But the Government has now abandoned that argument, recognizing that Section 2243 encompassed such conduct when "sexual abuse of a minor" was added to the INA in 1996 and Section 2241(c) continues to do so today. Petr. Br. 19.

That leaves the Government with two objections to construing Section 1101(a)(43)(A) consistent with the identical phrase in Section 2243. First, the Government argues that "sexual abuse of a minor" is merely the "title" of Section 2243. Resp. Br. 33-34. But it has been established since this Court's earliest days that titles give "aid in showing what was in the mind of the legislature." *Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818)). And just last Term, this Court treated "sexual abuse of a minor" and other headings in the chapter of the U.S. Code covering sexual-abuse offenses as relevant to interpreting other substantive provisions in the U.S. Code using the same language. *See Lockhart v. United States*, 136 S. Ct. 958, 964 (2016).

Second, the Government notes that Section 1101(a)(43)(A) does not explicitly "cross-reference" Section 2243. Resp. Br. 16. But this is not controlling. The default presumption is that when, as here, Congress uses "identical words" in different parts of the same legislation, it intends those words to mean the same thing in both places. Petr. Br. 18-19 (citing cases). The BIA, in fact, has held that the provision designating "obstruction of justice" takes its meaning from how that "term of art [is] utilized in the United States Code," even though the pertinent criminal provision was not enacted in the same legislation. *See In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 893 (B.I.A. 1999).

The Government nevertheless insists that the INA does not cross-reference Section 2243 because Congress wanted to cover types of illegal sexual acts involving minors beyond the conduct criminalized by Sections 2243(a) and 2241(c). Resp. Br. 35. But the INA bespeaks no such intent. To the contrary, the statute designates other types of sexual conduct toward minors—specifically, "child pornography" and "trafficking in persons"—as separate aggravated felonies. 8 U.S.C. § 1101(a)(43)(I), (K). And still other sexual acts against children can constitute "child abuse" or "crimes of moral turpitude" that likewise subject offenders to deportation. *See* Petr. Br. 34-35.

But even if Section 1101(a)(43)(A)'s words "sexual abuse of a minor" encompass conduct beyond the statutory-rape-type offenses covered by Sections 2243(a) and 2241(c), there is no reason to believe Congress would have wished the INA's coverage of *that category* of offenses to extend beyond the prohibitions in Sections 2243(a) and 2241(c). Under a

"plain language" approach, Congress's coverage of a particular crime in the INA should be presumed to refer to the identically worded crime in the federal criminal code absent strong evidence to the contrary. No such evidence exists here.

III. The BIA's Interpretation of "Sexual Abuse of a Minor" Is Not Entitled to *Chevron* Deference.

The Government tries to have it both ways with respect to the BIA. Despite urging the Court to adopt a definition of "sexual abuse of a minor" that diverges from BIA precedent, the Government urges deference to the BIA's holding that a conviction under Cal. Penal Code § 261.5(c) falls within Section 1101(a)(43)(A). Resp. Br. 36. But even if a multi-jurisdictional survey and the other interpretive tools just discussed did not clearly dictate the outcome here, there would still be no basis for applying *Chevron* deference.

A. Lack of Ambiguity

The Government acknowledges that many tools for resolving ambiguity in statutes precede *Chevron* deference. Resp. Br. 42. And this Court has stated that "the rule of lenity" is one such tool for deeming a statute "unambiguous" for *Chevron* purposes. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). Yet the Government says neither the canon requiring ambiguities in deportation cases to be resolved in favor of the noncitizen nor the criminal rule of lenity applies here. The Government is incorrect on both scores.

1. According to the Government, this Court has held the requirement to resolve statutory ambiguities against deportation is a canon that "must come only *after*" *Chevron* deference. Resp. Br. 43-44. But

Judulang v. Holder, 565 U.S. 42 (2011), does not stand for that proposition. *Judulang* did not involve *Chevron* or even the "interpretation of any statutory language." *Id.* at 52 n.7. And deportation was not at issue in either of the other cases the Government references. *Negusie v. Holder*, 555 U.S. 511 (2009), involved asylum. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), involved immigrant visas.

While the BIA's constructions of ambiguous statutes may well be entitled to deference when deportation is *not* at stake, there is a "longstanding principle" of construing ambiguities in the small slice of cases involving "deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Accepting the Government's "order-of-operations" argument (Resp. Br. 42-43) would eviscerate that principle. Instead of being required to guarantee fair notice to account for the "drastic measure" at stake, *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)), the BIA would always be free to adopt the harshest of all "reasonable" interpretations of statutes setting grounds for automatic deportation. That would be neither fair nor true to precedent.

2. The Government's arguments for applying *Chevron* instead of the criminal rule of lenity here fare no better.

a. The Government first maintains that applying the rule of lenity where a statute has both criminal and civil applications would "run[] headlong into this Court's precedents." Resp. Br. 48. But the Government ignores that in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S.

687 (1995), and *United States v. O'Hagan*, 521 U.S. 642 (1997), Congress had made it a crime to violate the regulations at issue. *See* 16 U.S.C. § 1540(b)(1) (*Babbitt*); 15 U.S.C. § 78n(e) (*O'Hagan*). Thus, those cases posed no separation of powers concern. *See* Pet. Br. 44. Nor did they present any serious notice problem, for the regulations had been on the books for many years. *See Babbitt*, 515 U.S. at 704 n.18 (20 years); *O'Hagan*, 521 U.S. at 668 (17 years).

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011), is even further afield. The Court proceeded there from the premise that "the statute requires fair notice" and held, without invoking *Chevron*, that it did. *Id.* at 14.

By contrast, the Government acknowledges that in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), the Court applied the rule of lenity "to a tax statute in a civil setting" because it had criminal applications. Resp. Br. 49 n.42. This Court has done so in other cases involving hybrid statutes as well. *See* Amicus Br. of NACDL 10-11 (collecting cases); *United States v. Santos*, 553 U.S. 507, 521-23 (2008) (plurality opinion). Therefore, insofar as precedent governs this issue, *Chevron* deference is off-limits.

b. Even setting precedent aside, the Government's position is untenable. Although the Government never squarely chooses, its position must amount to one of two things. First, it could be that Section 1101(a)(43)(A)—and, indeed, any hybrid statute—can mean one thing in immigration cases and something different in criminal cases. *See* BIO 10-11 & 20 n.2. But that would violate the principle that statutes cannot be "chameleons." *Clark v.*

Martinez, 543 U.S. 371, 382 (2005); Petr. Br. 42 (citing other case law). Second, the Government could think that any reasonable BIA construction of an ambiguous hybrid statute must control in criminal, as well as immigration, cases. But that would violate the separation of powers and create fair-notice problems. Petr. Br. 42-43; *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-57 (10th Cir. 2016) (Gorsuch, J., concurring) (endorsing this view).

None of the Government's attempts to get out of this bind has merit. The Government suggests that the rule of lenity may not apply to Section 1101(a)(43)(A)'s criminal applications because they are merely sentencing enhancements, relevant "only to defendants whose conduct violates additional legal requirements." Resp. Br. 46. But this Court has made clear that the rule of lenity "applies to sentencing as well as substantive provisions" of criminal law. *United States v. Batchelder*, 442 U.S. 114, 121 (1979); *accord United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion); *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

The Government also urges this Court to shun the rule of lenity here because Section 1101(a)(43) is implicated more often in immigration cases than in criminal cases. Resp. Br. 47. But the comparative rate at which a hybrid statute is invoked in civil versus criminal proceedings has nothing to do with the legal reasons why the rule of lenity must govern any ambiguities in such statutes. At any rate, the Government admits that Section 1101(a)(43)(A) is "frequent[ly]" invoked in illegal reentry prosecutions. Resp. Br. 47. That is an understatement. Illegal reentry is "the most frequent recorded lead charge" in

federal criminal cases, and "more than 40 percent" of those prosecuted face an enhancement for having a predicate "aggravated felony" conviction.[5]

Finally, the Government notes that some hybrid provisions of the INA concern "terrorism-related grounds of inadmissibility." Resp. Br. 53. This Court should not be cowed by this reference. Many federal statutes relating to national security matters apply *only* in the criminal realm. *See, e.g., United States v. Ressam*, 553 U.S. 272 (2008). The rule of lenity does not prevent the Government from effectively enforcing those laws; the Government just has to construe the laws correctly. *Id.* at 274. So too here.

B. Unreasonableness of the BIA's Analysis

Even if Section 1101(a)(43)(A) were ambiguous within the meaning of *Chevron*, the BIA's decision here would still not warrant deference because it is unreasonable. Indeed, the Government hardly defends the BIA's analysis against petitioner's three main critiques.

1. The Government cannot deny that the BIA improperly focused on a hypothetical of the *worst* conduct Cal. Penal Code § 261.5(c) could cover rather than the *least* of the acts criminalized. Petr. Br. 46-47. The Government's only response is that this error relates only to "whether the state offense falls under

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[5] Transactional Records Access Clearinghouse, *Prosecutions for December 2016*, http://trac.syr.edu/tracreports/bulletins/overall/monthlydec16/fil; U.S. Sentencing Comm'n, *Illegal Reentry Offenses*, at 9 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

the federal provision at issue," not to how to construe the federal provision in the first place. Resp. Br. 54. But, as explained above (at 3-6), these two inquiries need not be hermetically sealed off from one another, and the BIA itself did not do so, *see* Pet. App. 34a.

2. An agency acts unreasonably if it ignores critical information and instead "relie[s] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The BIA here did just that. It improperly ignored that a nationwide consensus dictates that consensual sex can constitute "abuse" solely because of the partners' ages only when the younger partner is under 16. *See supra* 7-12. The BIA also concluded that the definition in 18 U.S.C. § 3509 of "sexual abuse" for purposes of child testimony was more relevant than the federal statute (Section 2243) criminalizing "sexual abuse of a minor." Pet. App. 29a-30a. The Government never references Section 3509 in its analysis of Section 1101(a)(43)(A), nor does it defend the BIA's determination that Section 3509 is more instructive than Section 2243.

3. The Government says the BIA did not need to construe any ambiguity in Section 1101(a)(43)(A) in favor of the noncitizen because "[t]he Board . . . did not find" any ambiguity requiring it "to guess as to what Congress intended." Resp. Br. 55 (internal quotation marks and citation omitted). But there is no better evidence that the BIA was indeed forced "to guess at what Congress intended" than the fact that it was desperate enough to consult sources as far flung as an article regarding HIV prevention in a 20-year-old family planning journal to assess whether

convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor." Pet. App. 35a-36a. If nothing else, that perceived indeterminacy of the federal deportation statute at issue should have precluded the BIA from ruling against petitioner.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF PETITIONER

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136 Cong. Rec. 36,930 (1990) (statement of Rep. Edwards) 16, 17

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142 Cong. Rec. 8729 (1996) 7

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OTHER AUTHORITIES

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INTEREST OF AMICI CURIAE[1]

Amici are the three collaborating organizations in the nationwide Defending Immigrants Partnership, established to ensure that immigrants receive correct advice regarding the immigration consequences of criminal convictions. Additionally, amici are among the nation's leading experts on the intersection between immigration and criminal law, and thus have an interest in clear and fair rules for defining deportable conduct.

The Immigrant Defense Project ("IDP") is a nonprofit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Luna Torres* v. *Lynch*, 136 S. Ct. 1619 (2016); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015); *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Leocal* v.

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

Ashcroft, 543 U.S. 1 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 (2001) (citing IDP brief).

The Immigrant Legal Resource Center ("ILRC") is a national nonprofit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC has a direct interest in this case because ILRC advocates for greater rights for noncitizens accused or convicted of crimes. Each year ILRC provides assistance to hundreds of attorneys defending noncitizens in criminal prosecutions and removal proceedings throughout the Ninth Circuit and nationally.

The National Immigration Project of the National Lawyers Guild ("NIPNLG") is a national nonprofit organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and advocates seeking to advance the rights of noncitizens. For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct and authored *Immigration Law and Crimes* and four other treatises published by Thompson-Reuters. The NIPNLG also has participated as amicus curiae in significant immigration-related cases in the federal courts, including before this Court in, among others: *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Luna Torres* v. *Lynch*, 136 S. Ct. 1619 (2016); *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015); and *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012). Because the NIPNLG has substantial expertise in the issue presented here, having submitted a brief as amicus curiae in the court of appeals in this case, it presents this brief to assist the Court in its consideration of this case.

SUMMARY OF ARGUMENT

As this Court has made clear in a line of cases tracing back to *Taylor* v. *United States*, 495 U.S. 575 (1990), federal statutes that assign criminal or immigration consequences to state convictions are presumed to have adopted a uniform federal definition of the named offense. Discerning that definition may present a complicated exercise in some cases, when the Court must determine the modal elements of the offense of conviction across the fifty States. *See, e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007).

Here, however, there is a "readily apparent" federal definition of the offense. *Taylor*, 495 U.S. at 580-581. Congress first codified a federal crime of "sexual abuse of a minor" in 1986. Ten years later, just as it was considering amendments to that statute, it made "sexual abuse of a minor" a deportable offense. Under elemental canons of statutory construction, Congress's simultaneous consideration of these two laws, using precisely the same term, strongly counsels in favor of interpreting the two provisions to carry the same meaning of "minor," and to proscribe the same conduct, across the federal criminal and immigration laws.

In addition to being faithful to congressional intent, interpreting the Immigration and Nationality Act's "sexual abuse of a minor" provision to refer to the federal criminal law allays the significant constitutional concerns raised by the Board of Immigration Appeals' rudderless approach of evaluating state statutes of conviction on a case-by-case basis, using an inapposite federal victim-protection statute, 18 U.S.C. § 3509, as a mere "guide" for its inquiry. While the BIA's approach provides those charged with or convicted of potentially covered offenses with virtually no indication of whether

they will be deportable and ineligible for relief, the approach urged here provides constitutionally sufficient notice both of the relevant age limits and of the specific forms of prohibited sexual conduct.

ARGUMENT

I. CONGRESS CLEARLY DEFINED THE AGE LIMITS AND OTHER ELEMENTS OF THE CRIME OF "SEXUAL ABUSE OF A MINOR"

When applying the aggravated-felony provisions of the Immigration and Nationality Act ("INA") to convictions for state crimes, this Court seeks to discern whether the state offense categorically satisfies the "'uniform' federal definition" of the listed offense. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 n.11 (2013); *see also Nijhawan* v. *Holder*, 557 U.S. 29, 37 (2009) (describing "sexual abuse of a minor" as subject to this analysis (citing *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc)). The Court applies a variety of approaches to determine the uniform federal definition. In some cases, that definition can be found "in 'the generic sense in which the term is now used in the criminal codes of most States.'" *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007). Where, however, there is a "readily apparent" federal definition of the offense, the Court will apply it. *Taylor* v. *United States*, 495 U.S. 575, 580-581 (1990).

This is such a case. *See Estrada-Espinoza*, 546 F.3d at 1152 (finding it "unnecessary to survey current criminal law to ascertain a federal definition [for "sexual abuse of a minor" as used in the INA] because Congress has already supplied it"). As the text of the provision suggests and the legislative history confirms, Congress intended the phrase "sexual abuse of a

minor" in 8 U.S.C. § 1101(a)(43)(A) to refer to the offense of the same name described in the Sexual Abuse Act of 1986, as amended in 1996, the very year "sexual abuse of a minor" was added as an aggravated felony to the immigration statute.

A. Congress Defined "Sexual Abuse Of A Minor" In The Sexual Abuse Act Of 1986

The Sexual Abuse Act of 1986 enacted a broad federal prohibition on a range of sexual offenses occurring in areas of federal jurisdiction, from those involving "sexual acts" with minors to consensual sexual contact through clothing. *See* Pub. L. No. 99-646, § 87(b), 100 Stat. 3592, 3621.

As originally enacted, the statute criminalized sexual abuse specifically involving minors in two sections: 18 U.S.C. § 2241(c) (1986), entitled "Aggravated sexual abuse ... with children," proscribed engaging in a "sexual act" with a person under the age of 12, in areas of federal jurisdiction; § 2243(a) (1986), entitled "Sexual abuse of a minor," proscribed engaging in a "sexual act" in areas of federal jurisdiction with a person at least 12 but less than 16 years old if the perpetrator was at least four years older than the victim. In the same statute, Congress also proscribed "sexual abuse," not limited to minor victims, § 2242 (1986), and "[a]busive sexual contact," § 2244 (1986), which reaches less serious sexual conduct such as contact through clothing, § 2245 (1986) (defining "sexual contact").

By enacting for the first time a federal crime of "sexual abuse of a minor," the Sexual Abuse Act of 1986 elaborated the federal criminal regime relevant to this case. Two points about this framework bear noting here.

First, consistent with the Act's purpose of criminalizing "sexual act[s] involving a minor less than 16 years old," H.R. Rep. No. 99-594, at 17 (1986), Congress defined "minors" for purposes of federal sexual abuse law as victims under 16, in one instance with a four-year age disparity between the victim and the perpetrator, *see* §§ 2241(c), 2243(a) (1986). Nothing in the statute or legislative history suggests Congress intended federal sexual abuse law to reach victims 16 or older.

Second, Congress marked a meaningful distinction between sexual "abuse" and lesser forms of sexual "contact." While the three provisions criminalizing forms of "sexual abuse" proscribed "sexual acts," such as oral, anal, or vaginal penetration or direct touching, *see* §§ 2241, 2242, 2243, 2245(2) (1986), the fourth provision, criminalizing "abusive sexual contact," went further, proscribing, among other things, consensual sexual touching through clothing, *see* §§ 2244(a)(3), 2245(3) (1986). In other words, not every form of touching was, in Congress's view, a form of sexual abuse for federal criminal purposes.

B. IIRIRA Amended The INA To Adopt The Federal Criminal Definition Of "Sexual Abuse Of A Minor"

As originally enacted and amended for over 30 years, the INA did not treat "sexual abuse of a minor" or even child abuse (sexual or otherwise) as either an independent ground for deportability, which would trigger deportation with the possibility of relief for those who qualify, or an aggravated felony, which would mandate deportation without the possibility of

relief.[2] In 1996, however, Congress amended the INA by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which was intended, among other things, to provide immigration consequences for "child abuse and sexual abuse." 142 Cong. Rec. 10,067 (1996) (statement of Sen. Dole). As in *Taylor*, it is "helpful to review the background" of the relevant provisions of IIRIRA, 495 U.S. at 581, because they make clear that Congress intended the aggravated felony of "sexual abuse of a minor" to be described by the offense as defined in the Sexual Abuse Act of 1986, as amended by the Amber Hagerman Child Protection Act of 1996, which Congress considered and passed simultaneously with IIRIRA.

Senators Dole and Coverdell offered an amendment to the Senate version of H.R. 2202, the bill that would eventually become IIRIRA. The amendment provided new deportability grounds for any noncitizen convicted of a broad range of domestic and sexual violence offenses targeted at adults and minors, including, among others, domestic violence, stalking, child abuse, and child sexual abuse or "sexual violence" crimes such as "aggravated sexual abuse, sexual abuse, [and] abusive sexual contact." 142 Cong. Rec. 8729 (1996); H.R. 2202 (Sen.) (May 2, 1996) (adopting Dole-Coverdell amendment); 142 Cong. Rec. 10,067 (statement of Sen. Dole) ("I am particularly pleased

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[2] During that period, Congress likely assumed that such offenses would be deportable under the existing category of "crime involving moral turpitude." *See* 142 Cong. Rec. 8706 (1996) (statement of Sen. Coverdell) (acknowledging that a crime like "child sexual abuse" may be, but is not necessarily, deportable as a "crime of moral turpitude"); *see also Castle* v. *INS*, 541 F.2d 1064, 1065-1066 (4th Cir. 1976) ("carnal knowledge" of a 15-year-old is a crime involving moral turpitude).

that the Senate adopted the Dole-Coverdell amendment .... Under the Dole-Coverdell amendment, violations of domestic violence, stalking, child abuse laws, and crimes of sexual violence have been added as deportable offenses."). As is apparent from the bill's text, it drew the operative definition of covered sexual crimes from the Sexual Abuse Act of 1986, proposing to establish as grounds for deportation conduct that involved victims of all ages and encompassed both "sexual abuse" and less serious "sexual contact," namely as defined in 18 U.S.C. § 2241 ("Aggravated sexual abuse"), § 2242 ("Sexual abuse") and § 2244 ("Abusive sexual contact"). The amendment did not designate any crimes as aggravated felonies that would bar relief.

At conference, however, Congress amended the bill to more carefully calibrate the immigration consequences of different crimes of sexual violence. Important here, Congress made the crime of "sexual abuse of a minor" an "aggravated felony" for purposes of 8 U.S.C. § 1101(a)(43)(A). IIRIRA, Pub. L. No. 104-208, § 321(a)(1), 110 Stat. 3009, 3009-627 (1996) (amending § 1101(a)(43)(A)). As a result, noncitizens convicted of "sexual abuse of a minor" would be "deportable and ineligible for most forms of immigration benefits or relief from deportation." H.R. Rep. No. 104-828, at 228 (1996) (conf. rep.). But Congress deleted the references to the other specific sexual offenses set forth in the Sexual Abuse Act of 1986. Where those offenses correlated to lesser crimes, they remained covered by the offense "child abuse," *see, e.g.*, *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 510 (B.I.A. 2008) (concluding that the deportability ground of "crime of child abuse" includes sexual abuse or exploitation), which Congress deliberately left as

grounds for deportation with the possibility of relief, along with domestic violence and stalking. H.R. Rep. No. 104-828, at 228.

In other words, Congress singled out for particularly harsh treatment a group of offenses corresponding directly to a federal criminal prohibition—§ 2243(a) as defined in 1996—at the same time as it provided for less harsh immigration consequences for another group of offenses targeting other, lesser forms of criminal conduct directed at children.

The express reference, and harsher consequences assigned, to the offense of "sexual abuse of a minor" were far from happenstance. At the very same time Congress was considering the amendments to IIRIRA that defined sexual abuse of a minor as an aggravated felony, it was also considering revisions to the statutory definitions of the corresponding federal crimes that broadened the federal prohibition and harshened the associated penalties.

In revisions proposed through the Amber Hagerman Child Protection Act of 1996, which was enacted as part of the same omnibus law that contained IIRIRA, *see* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 121, 321, 110 Stat. 3009, 3009-31, 3009-627 (1996), Congress amended 18 U.S.C. § 2243(a) to make explicit that "sexual abuse of a minor" reached victims *both* younger than 12 years of age *and* at least 12 but less than 16 where the perpetrator is at least four years older. H.R. Rep. No. 104-863, at 33, 802-803 (1996) (conf. rep.). As discussed above, *see supra* p. 5, § 2241(c) and § 2243(a) as originally enacted had covered complementary age ranges: § 2241(c) punished sexual acts with a victim

"who has not attained the age of 12 years," and § 2243(a) criminalized sexual acts with a victim who was at least 12 but less than 16 years old, where the offender was at least four years older. The Amber Hagerman amendments expanded each section's reach to cover the other's range as well, in specific federal jurisdictional circumstances, and harshened the penalties associated with the former offense. Pub. L. No. 104-208, div. A, § 121 subsec. 7, 110 Stat. 3009, 3009-31; *see id.* (providing for life sentence for violations of § 2241(c), or the death penalty for repeat offenders). If Congress had previously been unclear as to whether § 2243(a), titled "sexual abuse of a minor," covered victims both under 12 and at least 12 but not yet 16 where the requisite age difference was present, the amendment eliminated any ambiguity.[3]

At the same time Congress amended the INA to establish that a conviction for "sexual abuse of a minor" would be a mandatorily deportable offense under 8 U.S.C. § 1101(a)(43)(A), it also refined the definition of that same term in the Sexual Abuse Act to cover cases of sexual abuse where the victim was under 12 years old, or at least 12 years old but under 16 and at least four years younger than the abuser. *See* 142 Cong. Rec. 26,636 (1996) (statement of Sen. Hatch) (praising Amber Hagerman Act as an "important measure in this omnibus bill").[4] Congress's simultaneous consideration

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[3] As the Department of Justice observed, these amendments created some overlap between the two provisions. *See* U.S. Dep't of Justice, *Crim. Resource Manual* § 2467, *available at* https://www.justice.gov/usam/criminal-resource-manual (last visited Dec. 23, 2016).

[4] The Amber Hagerman Act referred to the amended 18 U.S.C. § 2241(c) (titled "Aggravated sexual abuse ... with children") as "aggravated sexual abuse of a minor." Pub. L. No.

of these two laws using precisely the same term shows that Congress intended for the two provisions to have the same meaning, and to address the same conduct, across the federal criminal law and the INA. *See Lewis* v. *United States*, 445 U.S. 55, 63 (1980) (finding informative the treatment of analogous statutory text passed contemporaneously in the same omnibus statute); *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979) ("The package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy.").

Some courts have rejected reading "sexual abuse of a minor" in § 1101(a)(43)(A) as referring to the corresponding offense described in the Sexual Abuse Act on the ground that the phrase "sexual abuse of a minor" appears only in § 2243(a), which now only addresses victims who are at least 12 but under 16, while Congress intended § 1101(a)(43)(A) to be broadly protective. *See, e.g.*, *Esquivel-Quintana* v. *Lynch*, 810 F.3d 1019, 1025-1026 (6th Cir. 2016); *Restrepo* v. *Attorney Gen.*, 617 F.3d 787, 794-795 (3d Cir. 2010). Those decisions ignore, however, that the current, narrower version of § 2243(a) was enacted in 1998—two years after Congress enacted IIRIRA using the same term ("sexual abuse of a minor") just as it was broadening the definition of that term in the federal

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104-208, div. A, § 121, subsec. 7, 110 Stat. at 3009-31. Congress's insistent use of the phrase "sexual abuse of a minor" (or its "aggravated" variant) even where the statute had (and continues to have) a different formal heading strongly suggests that this phrase had a specific and particular meaning to Congress in 1996 when both the INA and the federal criminal law were being amended.

criminal law to also explicitly reach children under 12 years old.[5] The relevant question is what the term meant in the Sexual Abuse Act at the time Congress adopted it in IIRIRA. *See Director, Office of Workers' Comp. Programs, Dep't of Labor* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994); *see also Carcieri* v. *Salazar*, 555 U.S. 379, 388 (2009) (terms in a statute must be construed in accordance with their contemporary meaning). Because, in 1996, § 2243(a)'s definition of "sexual abuse of a minor" reached offenses involving persons younger than 12, and persons at least 12 but under 16 if the perpetrator is at least four years older, these courts' concerns about the breadth of the term are misplaced.[6]

Other courts have held that Congress never meant to refer to the Sexual Abuse Act's age limits in the INA at all, since Congress used the "sexual abuse of a

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[5] *See* Protection of Children from Sexual Predators Act, Pub. L. No. 105-314, 112 Stat. 2979 (1998). *Compare* 18 U.S.C. § 2241(c) (continuing to punish sexual abuse offenses involving victims younger than 12, as well as at least 12 but under 16 where the perpetrator is four years older), *with* 18 U.S.C. § 2243(a) (punishing sexual abuse offenses involving victims who are at least 12 but not yet 16 where the perpetrator is four years older). They also ignore that Congress in 1996 viewed the crime proscribed in § 2241(c) as "aggravated sexual abuse of a minor." Pub. L. No. 104-208, div. A, § 121, subsec. 7, 110 Stat. at 3009-31.

[6] Even if one were to ignore the 1996 inclusion of victims under age 12 in § 2241, the structure of §§ 2241 through 2243 would still make clear that current § 2241(c) supplements § 2243(a) in defining "sexual abuse of a minor." Indeed, in the 1996 amendments to the Sexual Abuse Act, included in the same omnibus legislation as IIRIRA, Congress labeled § 2241(c) as "aggravated sexual abuse of a minor," making clear that Congress saw § 2241(c) as one end of a continuum with § 2243(a) covering the range of "sexual abuse of a minor" conduct. Pub. L. No. 104-208, div. A, § 121, subsec. 7, 110 Stat. at 3009-31.

minor" terminology in § 1101(a)(43)(A) instead of explicitly cross-referencing a statute, as it did in other sections of § 1101(a)(43). *See, e.g., Rangel-Perez* v. *Lynch*, 816 F.3d 591, 596 (10th Cir. 2016). That is immaterial. Explicitly cross-referencing the age limits of the Sexual Abuse Act would not have made sense at the time Congress added "sexual abuse of a minor" as an aggravated felony in the INA. Sections 2241(c) and 2243(a) contain federal jurisdictional elements, which would not have been part of the corresponding state offenses. *See, e.g.*, 18 U.S.C. § 2241(c) (1996) ("Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years[.]"); *id.* § 2243(a) (1996) ("Whoever ... in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act" with another person at least 12 years old but under 16 who is "at least four years younger[.]"). While today it is clear that a cross-reference to a federal statute to define a state crime for purposes of the categorical approach does not include mere jurisdictional elements, *see Luna Torres* v. *Lynch*, 136 S. Ct. 1619 (2016), that principle had not yet been established in 1996. Thus, the sensible thing at the time was for Congress to use the term "sexual abuse of a minor" rather than to cross-reference the provisions of the Sexual Abuse Act establishing the federal offense's age limits.[7]

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[7] Moreover, the requirement in § 2241(c) that the defendant "cross[] a State line" is not merely jurisdictional; it substantively narrows the federal offense and distinguishes it from state analogs. Petitioner in *Luna Torres* did not, however, make a

C. 18 U.S.C. § 3509 Has No Bearing On The INA's Definition Of "Sexual Abuse Of A Minor"

As the foregoing makes clear, Congress intended the INA to incorporate the meaning of "sexual abuse of a minor" as used in the Sexual Abuse Act, with its attendant limitations on age and proscribed conduct intact. Interpreting § 1101(a)(43)(A) to incorporate 18 U.S.C. § 3509(a), on the other hand, is insupportable by reference to congressional intent. There is no reference to § 3509 in the legislative history of IIRIRA or any contemporaneous legislative enactment. And the legislative history of § 3509 reveals that Congress in no way contemplated defining the federal offense of "sexual abuse of a minor" when enacting that statute.

Section 3509 was enacted in the Victims of Child Abuse Act of 1990, which established "special procedures to protect child victims and witnesses in court." H.R. Rep. No. 101-681, at 165 (1990); *see also id.* at 41 ("§ 3509. Special procedures applicable to child witnesses and victims"). The Act aimed to ensure that "a court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate," Pub. L. No. 101-647, tit. II, § 216, 104 Stat. 4789, 4792, 4794 (1990), and "to provide expanded technical assistance and training to judicial personnel and attorneys, particularly personnel and practitioners in juvenile and family courts, to improve the judicial system's handling of child abuse and neglect cases," *id.* § 221(b), 104 Stat. at 4797. To those ends, it authorized grants for attorney

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particularized argument that the requirement was substantive. *See Luna Torres*, 136 S. Ct. at 1634. Even under *Luna Torres*, then, it is not clear that Congress would have included in the aggravated-felony provision any express cross-reference to this criminal statute.

assistance and training and for closed-circuit televising of the testimony of child-abuse victims. *Id.* §§ 213-214, 104 Stat. at 4793-4794. No provisions of the Act concern substantive criminal offenses or immigration law.

Congress could have connected § 3509 to criminal offenses or immigration law if it wanted to; indeed, it was contemplating changes to both at the time. The Victims of Child Abuse Act was enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, 101 Stat. 4789. In early iterations, the Crime Control Act included a new substantive criminal offense, *see* H.R. Rep. No. 101-681 at 21, 71 (proposing new computer-hacking offense), and amendments to the definition of "aggravated felony" in the INA, *see id.* at 33-34, 147. Indeed, the proposed INA amendment concerned § 1101(a)(43)(A) itself; it would have added state and federal drug-trafficking to that subsection. *See id.* at 33. But that was the only change to § 1101(a)(43)(A) that Congress considered in the Crime Control Act. Members of the House Judiciary Committee even objected to the Crime Control Act's failure to expand the grounds for deportation of noncitizens convicted of crimes. *Id.* at 338. These members would be surprised indeed to learn that the Crime Control Act would later be interpreted to have done just that—through the Victims of Child Abuse Act, no less.

Congress in no way connected the Victims of Child Abuse Act to the age of consent for federal sexual abuse offenses, deportability, or indeed any substantive criminal or immigration provisions. More to the point, the legislative history of IIRIRA is entirely devoid of reference to § 3509. This is hardly surprising in view of § 3509's purpose to protect victims of child abuse from the trauma of testifying before their alleged assailants.

Congress found that, when prosecuting child-abuse cases, "too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." Pub. L. No. 101-647, § 211, 104 Stat. at 4792. Because of this, "for many children, the [trial] itself can become a second trauma" or a "potential second assault." H.R. Rep. No. 101-681, at 166. In response, the Victims of Child Abuse Act "helps the people who are really the most vulnerable in our criminal justice system ... [by] sort of put[ting] its arms around that child and help[ing] that child through the criminal justice system." 136 Cong. Rec. 36,928 (1990) (statement of Rep. DeWine).

That goal has nothing to do with the offense at issue in this case, engaging in consensual sexual intercourse with someone below the age of consent. The conduct this offense prohibits is consensual. *See United States* v. *Rangel-Castaneda*, 709 F.3d 373, 377 (4th Cir. 2013); *see also* H.R. Rep. No. 99-594, at 7, 16 (defining this conduct as consensual and defining the offense in § 2243 as consensual). When a 16-year-old has consensual sex with a 20-year-old, or a 17-year-old with a 21-year-old, the law does not need to protect against a "second trauma" or "second assault." H.R. Rep. No. 101-681, at 166. Consensual sexual acts were self-evidently not considered when Congress aimed to prevent a child victim from coming face to face with his "physical tormentors." 136 Cong. Rec. 36,930 (statement of Rep. Edwards). A provision intended to protect victims of trauma is unrelated to an offense whose victims acted consensually.

It makes no sense, therefore, to import § 3509(a)'s age limit (18) into the federal "sexual abuse of a minor" offense. *Cf. Judulang* v. *Holder*, 132 S. Ct. 476, 485

(2011) (finding arbitrary and capricious an interpretive approach that was not "tied, even if loosely, to the purposes of the immigration laws" at issue). The legislative history shows that Congress considered two ages for eligibility for § 3509's procedural protections, 15 and 18. *See* H.R. Rep. No. 101-681, at 169 (defining "child" as "an individual under the age of 15 years" and "those individuals up to age 18 who are known to be of a developmental age of 15 years"). Had Congress been contemplating an age limit applicable to the age of consent, it would not have considered an age lower than that in all but a handful of states.

There is likewise no reason to think that the age Congress ultimately established—an age higher than the age of consent in almost all jurisdictions—was intended to define the federal age of consent. Congress's considerations with respect to age in § 3509 were simply different than those relevant to § 1101(a)(43)(A). Congress thought that the experience § 3509 targeted—testifying before one's assailant—could be traumatizing regardless of age. *See* 136 Cong. Rec. 36,928 (statement of Rep. DeWine) ("[E]ven to an adult many times, [this] is a very sterile, very tough situation."). Only safeguards for children, however, are constitutionally permissible. *See id.* at 36,930 (statement of Rep. Edwards) ("[T]hese extraordinary exceptions to the constitutional right to face-to-face confrontation [are designed] ... only to protect children from the trauma of confronting their alleged physical tormentors."); *cf.* *Maryland* v. *Craig*, 497 U.S. 836, 855 (1990) (upholding confrontation exception only because "protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important"). Setting the age at 18 may have involved constitutional considerations unrelated to consent rather than an arguably relevant

policy choice. Whatever Congress's reasons for § 3509(a)'s age limit, they had nothing to do with establishing the age of consent.

II. Defining "Sexual Abuse Of A Minor" By Reference To The Federal Criminal Law Avoids The Vagueness Concerns Raised By The BIA's Approach

Defining the aggravated felony of "sexual abuse of a minor" by reference to the federal criminal law would avoid the unconstitutional vagueness concerns implicated by the approach taken by the Board of Immigration Appeals and endorsed by the court below.

In order to comport with the Constitution's guarantee of due process, a criminal statute must "provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). A statute that is so vague that it fails to provide fair notice or invites arbitrary enforcement is void for vagueness. *See, e.g.*, *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015) (finding residual clause of Armed Career Criminal Act void for vagueness); *see also Jordan* v. *De George*, 341 U.S. 223, 231 (1951) (applying vagueness doctrine to immigration law "in view of the grave nature of deportation").

Reading the aggravated felony of "sexual abuse of a minor" to refer to the offense of the same name in the federal criminal law provides such notice, both of the relevant age limits and of the specific forms of prohibited sexual conduct.[8] By contrast, the BIA's

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[8] Indeed, amici's interpretation should be favored because its single definition of "sexual abuse of a minor" eliminates the need to litigate a range of issues related to the meaning of "sexual abuse."

approach to interpreting and applying the term—rejecting its criminal-law definition as too restrictive and adverting to § 3509(a) not as a definition but rather as a mere guide to be applied on a case-by-case basis—provides those charged with or convicted of potentially covered offenses with virtually no indication of whether their convictions would render them deportable and ineligible for relief. *See McDonnell* v. *United States*, 136 S. Ct. 2355, 2373 (2016) (avoiding the potentially vague "standardless sweep of the Government's reading" by adopting a "more constrained interpretation" of a statute) (internal quotation marks and citations omitted).

A. The BIA Has Not Offered Or Adopted A Definition Of "Sexual Abuse Of A Minor"

When first confronted with the term "sexual abuse of a minor," the BIA elected not to define it. *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 993 (B.I.A. 1999). Although it acknowledged the potential relevance of the federal criminal provisions at 18 U.S.C. §§ 2241-2244 and the victim-protection statute at 18 U.S.C. § 3509, the BIA did not think any of those provisions defined "sexual abuse of a minor." *Id.* ("Congress did not provide a definition of the term 'sexual abuse of a minor.'"). Instead, the BIA rejected the criminal provisions as "too restrictive" and deemed § 3509(a) merely "a useful identification of the forms of sexual abuse." *Id.* at 995. The BIA accordingly decided to "invoke [§ 3509(a)] as a guide in identifying the types of crimes [it] would consider to be sexual abuse of a minor," but expressly did "not adopt[] this statute as a definitive standard or definition." *Id.* at 996. Nor did the BIA then provide its own definition; it simply concluded that the crime at issue in that case, indecent

exposure to a child, "is clearly sexual abuse of a minor within the meaning of" § 1101(a)(43)(A). *Id.*

The BIA has not resolved this indeterminacy since. The BIA's decision in *In re V-F-D*, 23 I. & N. Dec. 859 (B.I.A. 2006), continued to use § 3509(a) as a guide without adopting it as definitive. And the BIA's decision in this case, *In re Esquivel-Quintana*, 26 I. & N. Dec. 469 (B.I.A. 2015), relied on *Rodriguez-Rodriguez* and *V-F-D* to hold that it must "define 'sexual abuse of a minor' under the Act on a case-by-case basis." The BIA thus left § 1101(a)(43)(A) undefined. *See Larios-Reyes* v. *Lynch*, __ F.3d __, 2016 WL 7099825, at *8 (4th Cir. 2016) (declining to defer to BIA for failure to adopt a federal definition of "sexual abuse of a minor"); *Rangel-Perez*, 816 F.3d at 597-599 (observing *Rodriguez-Rodriguez* did not define "sexual abuse of a minor" in § 1101(a)(43)(A)); *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1157-1158 (9th Cir. 2008) (en banc) (same); *cf. Velasco-Giron* v. *Holder*, 773 F.3d 774, 780-781 (7th Cir. 2014) (Posner, J., dissenting) (same).

The BIA's approach does not offer fair notice of what actions fall within that prohibition. Rather than define the term "sexual abuse of a minor" or any of its elements, the BIA concluded that the statutory definition could vary from case to case. This moving target does not provide fair notice or prevent arbitrary enforcement. Such indeterminacy raises a serious risk of unconstitutional vagueness.

B. Adopting § 3509(a) Does Not Resolve Constitutional Vagueness Concerns

Despite express language to the contrary, some courts interpret *Rodriguez-Rodriguez* to adopt § 3509(a) as the BIA's definition of "sexual abuse of a

minor." *See, e.g.*, *Restrepo*, 617 F.3d at 795-796; *Gaiskov* v. *Holder*, 567 F.3d 832, 835 (7th Cir. 2009); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 57-60 (2d Cir. 2001). Tethering the aggravated-felony definition of "sexual abuse of a minor" to § 3509(a) would not allay these well-founded vagueness concerns.

Section 3509(a) is not a substantive criminal statute. It does not define the elements of any offense, and thus does not provide those charged with or convicted of related offenses with notice of what conduct is and is not prohibited. Indeed, no definition of "sexual abuse of a minor" is at all readily discernible from § 3509(a), a statutory provision that comprises twelve definitions and many subdivisions. The BIA has provided no assistance in clarifying things. The only subdivision the BIA mentions in *Rodriguez-Rodriguez* is § 3509(a)(8), which states that "sexual abuse" "includes" certain activities (which are set forth further in § 3509(a)(9)'s definition of "sexually explicit conduct"). Neither the definitions collected in § 3509(a) nor the nonexclusive list of conduct in § 3509(a)(8) can be reasonably interpreted to comprise the elements of a criminal offense.

Section 3509(a) is an especially poor vehicle for defining "sexual abuse of a minor" in the context of consensual sexual conduct. Because the prohibited act is consensual, the offense is defined by two critical elements: the ages of the victim and the perpetrator. *See, e.g.*, 18 U.S.C. § 2243(a); Model Penal Code § 213.3(1)(a); Cal. Penal Code § 261.5(c). But § 3509(a) defines "child" as someone under 18, and makes no other mention of age. *See* 18 U.S.C. § 3509(a)(2). It does not mention an age range between perpetrator and victim, nor does it indicate that otherwise legal

conduct might be criminal when performed between parties of sufficiently disparate ages.

Relying on § 3509(a) to define what consensual sexual conduct constitutes "sexual abuse of a minor" therefore leads to one of two results, the first of which Congress could not have intended and the second of which leaves vagueness concerns unresolved.

First, "sexual abuse of a minor" could refer to sexual conduct with a person under 18 regardless of the perpetrator's age. Although this offense would be clear, it cannot be what Congress intended. Under this reading, a person who turned 18 on Monday and had consensual sex on Tuesday with someone turning 18 on Wednesday has committed the aggravated felony of sexual abuse of a minor, and is deportable and ineligible for discretionary relief. Two 17-year-olds having consensual sex the day before their 18th birthdays have committed the aggravated felony of sexual abuse of a minor. A 17-year-old having consensual sex with a 16-year-old has committed the aggravated felony of sexual abuse of a minor—and so has the 16-year-old. Congress cannot have intended these absurd consequences of defining "sexual abuse of a minor" by reference to § 3509(a)'s age limit.

Second, an age discrepancy might still be required—just not as defined by § 3509(a), which is silent on the point. But the Constitution requires fair notice of what that age discrepancy is. The BIA has said only that the age differential must be "meaningful." *In re Esquivel Quintana*, 26 I. & N. Dec. at 475-476. The BIA did not quantify meaningfulness, except to say in this case that the three-year age differential was sufficient because the state statute punished sexual acts involving 16- and 17-year-olds.

See id. at 475. Going forward, however, the BIA concluded that it must "evaluate[] statutes individually and define 'sexual abuse of a minor' under the Act on a case-by-case basis." *Id.* at 476. Under this approach, noncitizens charged with or convicted of state offenses prohibiting consensual sexual conduct between people of certain ages cannot know where the BIA would draw the line until the BIA considers their statute of conviction, and thus have insufficient notice of whether their state convictions will qualify as aggravated felonies even if the BIA nominally relies on § 3509(a).

Because neither the BIA's decisions nor reliance on § 3509(a) offers a definition of "sexual abuse of a minor" that adequately allays serious constitutional concerns, *see Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001), the Court should interpret § 1101(a)(43)(A) by reference to the federal criminal law—which, as shown above, is the result Congress intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26 (1994) 11

Neil M. Gorsuch, *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743 (2014) 14

Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345 14

R. MCWHIRTER, ABA, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW 23

Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885 (2004) 10

Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997) 13

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States representing attorneys practicing in the field of criminal defense—including private criminal-defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL files numerous amicus curiae briefs each year in this Court and other courts. This Court has often cited NACDL amicus curiae briefs that address the everyday workings of the criminal-justice system and the implications of the Court's decisions in criminal justice and immigration cases.

NACDL and its members have a longstanding interest in the question whether the rule of lenity applies when a court confronts an ambiguous statutory provision that has both civil and criminal applications and that an administrative agency has interpreted. NACDL filed an amicus brief in this Court on that subject last Term in *Luna Torres v. Lynch*, No. 14-1096. Given NACDL's expertise on this issue, NACDL respectfully submits that its perspective would be helpful to the Court in deciding this case.

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[1] Pursuant to Supreme Court Rule 37.3(a), Petitioner and Respondent have consented to the filing of this brief. Petitioner has filed a blanket consent to the filing of amicus curiae briefs. A letter of consent from Respondent has been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, amicus represents that no party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This case concerns the meaning of the statutory term "sexual abuse of a minor," an "aggravated felony" under the Immigration and Nationality Act (INA). 8 U.S.C. § 1101(a)(43)(A) (defining "aggravated felony" to include "murder, rape, or sexual abuse of a minor"). The Sixth Circuit held that petitioner's conviction under California Penal Code section 261.5(c)—which criminalizes consensual sexual conduct that is not even criminal in 43 states and is punishable as a felony in just three—constituted an "aggravated felony." In so holding, the Sixth Circuit did not determine that the Board of Immigration Appeals' (BIA's) interpretation of section 1101(a)(43) was the *best* reading of the statute. Rather, it deferred to the BIA's reading as a *reasonable* interpretation under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This was error.

The Sixth Circuit misconceived the role of *Chevron* deference in a case, such as this one, calling for an interpretation of a "hybrid" statute—one carrying both civil and criminal applications. When a court confronts such a statute and identifies an ambiguity in it, rather than deferring to the agency's interpretation under *Chevron*, the court should apply all relevant principles of statutory interpretation, including (as relevant here) the rule of lenity. "All manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013)

(Sutton, J., concurring) (citing numerous examples from this Court's rulings).

The reason for this is straightforward. It is a principle nearly as old as the common law itself that criminal statutes must be interpreted according to the rule of lenity, which requires ambiguities to be resolved in the defendant's favor and narrows a statute's potential punitive reach. *United States v. Bass*, 404 U.S. 336, 347 (1971). This Court has also recognized a unitary-meaning principle: a statutory provision that has both civil and criminal applications carries a single, unitary meaning. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Put together, these two principles compel the conclusion that the rule of lenity must be applied to hybrid statutes even when the question of the statute's reach arises in a civil case. The Court's opinions recognize as much. See, *e.g.*, *id.*; *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *FCC v. ABC*, 347 U.S. 284, 296 (1954) (explaining that lenity must be applied even in a civil case because "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice"). Application of the rule of lenity leaves no room for *Chevron* deference: *Chevron* comes into play only *after* applying traditional tools of statutory interpretation, and the rule of lenity is one such tool.

Not only does doctrinal reasoning point toward this result; so too do the functional policy rationales underlying the rule of lenity. The rule of lenity serves "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance be-

tween Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Given the proliferation of hybrid statutes, many with far-reaching criminal provisions, applying the rule of lenity rather than *Chevron* helps to protect the public from arbitrary or unfair criminal prosecutions based on obscure administrative interpretations of ambiguous statutes.

Against all this, the Court of Appeals in this case believed that a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), required deference to the BIA's interpretation of section 1101(a)(43), notwithstanding that provision's criminal applications. Pet. App. 10a. But *Babbitt*'s footnote cannot bear the weight the Sixth Circuit placed on it. Accepting the Sixth Circuit's reading of *Babbitt* means accepting (implausibly) that this Court overruled longstanding precedent without expressly saying so. Moreover, *Babbitt* is distinguishable in key respects: it involved a facial challenge to a 20-year-old regulation, not (as here) a challenge to an agency interpretation made through case-by-case adjudication years after the relevant conduct.

Even if the *Chevron* framework applies to agency interpretations of hybrid statutes, the BIA's interpretation here deserves no deference. As discussed in petitioner's brief, the BIA's reading of the statute is not a reasonable one. Two additional considerations make deference inappropriate in this case.

First, the BIA's lack of expertise in applying or interpreting criminal laws further counsels against *Chevron* deference here, since "practical agency expertise" is one of *Chevron*'s main rationales. *Pension*

Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990). Courts, not government agencies, are best suited to apply the categorical approach to determine what crimes constitute "aggravated felonies."

Second, affording *Chevron* deference to the BIA's interpretation would create significant practical difficulties for criminal-defense lawyers and their clients. Under *Padilla v. Kentucky*, 559 U.S. 356 (2010), defense counsel must advise their clients of the immigration consequences of any plea agreement. Deference to the BIA's interpretations of the INA would charge criminal defense attorneys with awareness of ever-shifting immigration law, at the administrative level, in order to meet their constitutional obligations. Not only that, criminal defense attorneys would be obligated to try to *predict* whether the BIA might rely (as it did here, see Petr. Br. 28-29) on a wide variety non-criminal sources, such as periodicals and scientific journals, to determine the immigration consequences of criminal convictions. The practical impossibility of that task confirms that *Chevron* deference is unwarranted here.

ARGUMENT

NACDL agrees with petitioner that the Sixth Circuit misapplied the categorical approach in determining the meaning of the statutory term "sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A). See Petr. Br. 14-35. It submits this brief not to rehash those arguments but to elaborate on an additional error committed by the Court of Appeals: affording *Chevron* deference to the BIA's interpretation of "sexual abuse of a minor"

without resort to the rule of lenity, notwithstanding the many criminal applications of section 1101(a)(43).

I. BIA INTERPRETATIONS OF "AGGRAVATED FELONY" DO NOT QUALIFY FOR *CHEVRON* DEFERENCE

Two established principles, taken together, compel the conclusion that the Sixth Circuit erred in affording *Chevron* deference to the BIA's statutory interpretation rather than applying the rule of lenity to resolve the statutory ambiguity. *First*, the rule of lenity has long directed courts to interpret ambiguity in a criminal statute narrowly, in favor of the defendant. *E.g.*, *Bass*, 404 U.S. at 347. *Second*, "hybrid" statutory provisions—those with both civil and criminal applications—have a single, unitary meaning that does not shift depending on context. *E.g.*, *Leocal*, 543 U.S. at 11 n.8.

In multiple cases, this Court has already recognized that these principles, when combined, require application of the rule of lenity to hybrid statutory provisions. *E.g.*, *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion); *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing that the rule of lenity applies); *FCC v. ABC*, 347 U.S. at 296. That approach is in full accord with the rationales underlying the rule of lenity. It would also protect, rather than undermine, the separation of powers.

In reaching a contrary result, the Sixth Circuit relied entirely on a single footnote in *Babbitt*, 515 U.S. at 704 n.18. But *Babbitt* cannot support the great weight the Court of Appeals put on it—it would require accepting that this Court overruled longstanding precedent and did so without expressly saying so. If the

Babbitt footnote is not simply overruled itself, it should at the least be given a narrower reading that would accommodate rather than contradict these precedents.

A. Section 1101(a)(43) Has Extensive Criminal Applications, with Substantial Penal Consequences

The INA, like numerous other statutes, has both civil and criminal applications. It criminalizes, among other things, (1) an immigrant's failure to leave the country after an order of removal, 8 U.S.C. § 1253; (2) the harboring of certain immigrants, *id.* § 1324; (3) an immigrant's improper entry, or reentry, into this country, *id.* §§ 1325, 1326; (4) providing assistance to immigrants who are improperly entering the country, *id.* § 1327; and (5) the importation of immigrants for immoral purposes, *id.* § 1328.

Section 1101(a)(43), the INA provision at issue in this case, itself has numerous and significant criminal applications. For example, it is a felony to aid or assist "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony)." 8 U.S.C. § 1327. Likewise, the federal failure-to-depart statute makes it a felony for immigrants convicted of an aggravated felony to remain in the country. See *id.* §§ 1253(a)(1), 1227(a)(2)(A)(iii).

Section 1101(a)(43) also substantially increases the sentencing exposure of those convicted of certain federal criminal offenses. For example, the maximum penalty authorized by statute for illegal reentry under 8 U.S.C. § 1326 is 2 years for a "simple" offense, meaning no enhancements based on predicate convictions, but 20 years if the defendant has been previously con-

victed of an aggravated felony. See *id.* § 1326(b)(2) (also identifying an intermediate penalty for those with prior non-aggravated-felony convictions). Similarly, a federal criminal defendant faces a maximum prison term of 4 years for "simple" failure to depart under 8 U.S.C. § 1253(a)(1), but he or she faces a maximum 10-year prison term if previously convicted of an aggravated felony. See *id.*; *id.* § 1227(a)(2)(A)(iii).

These criminal law consequences under section 1101(a)(43) are widespread. The illegal reentry statute is the second-most prosecuted felony (after illegal entry) in the federal courts. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TRAC REPORTS, PROSECUTIONS FOR 2014 (Dec. 5, 2014).[2] In 2013, illegal reentry cases accounted for more than a quarter of all federal criminal sentencings and five out of every six sentencings involving immigration offenses. U.S. SENTENCING COMMISSION, ILLEGAL REENTRY OFFENSES 9-10 (April 2015).[3] Moreover, of the 18,498 illegal reentry defendants sentenced in 2013, "slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2)" because of an aggravated felony conviction, instead of a two- or ten-year statutory maximum that otherwise would apply. *Id.*

Not surprisingly, then, federal courts routinely are called upon in criminal cases to determine what crimes rank as "aggravated felon[ies]" within the meaning of section 1101(a)(43), including under the "sexual abuse of a minor" provision at issue in this case. See, *e.g.*,

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[2] http://tracfed.syr.edu/results/9x20548211252a.html.

[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

United States v. Londono-Quintero, 289 F.3d 147, 151 (1st Cir. 2002) (interpreting the aggravated felony of "sexual abuse of a minor," § 1101(a)(43)(A)); *United States v. Martinez*, 786 F.3d 1227, 1230-33 (9th Cir. 2015) (same); *United States v. Pacheco*, 225 F.3d 148, 153-55 (2d Cir. 2000) (interpreting the aggravated felony of "theft offense," § 1101(a)(43)(G)); *United States v. Gamboa-Garcia*, 620 F.3d 546, 548-50 (5th Cir. 2010) (interpreting the aggravated felony of "an offense relating to obstruction of justice," § 1101(a)(43)(S)).

B. Because Section 1101(a)(43) Has Criminal Law Consequences, the Rule of Lenity Rather than *Chevron* Must Be Applied to Resolve Statutory Ambiguities

1. This Court's Precedent Dictates that the Rule of Lenity Applies, Requiring "Aggravated Felony" to Be Construed Narrowly and in Favor of Petitioner

It is a fundamental rule of statutory interpretation, "perhaps not much less old than construction itself," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.), that in construing a criminal statute, the rule of lenity requires that ambiguities be resolved in the defendant's favor. *Bass*, 404 U.S. at 347; see also, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990) (describing lenity as a "time-honored interpretive guideline"); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *88 (describing lenity as a rule of strict construction); Zachary

Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 897 (2004) (discussing the rule of lenity's "origins in the efforts of common law courts in the seventeenth and eighteenth centuries"). The rule has its roots in several foundational principles of American law: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective and arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952.

It is also well established that, where a single statute has both civil and criminal applications, courts "must interpret the statute consistently, whether [they] encounter its application in a criminal or non-criminal context." *Leocal*, 543 U.S. at 11 n.8; see also, *e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark v. Martinez*, 543 U.S. 371, 380 (2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003); *FCC v. ABC*, 347 U.S. at 296 ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."). Disregarding this unitary-meaning principle "would render every statute a chameleon, its meaning subject to change" depending on the circumstances. *Clark*, 543 U.S. at 382.

Putting these two rules together leads to the conclusion that the rule of lenity must be applied to "hybrid" statutes with both civil and criminal applications. This Court's opinions say as much. See *Leocal*, 543 U.S. at 11 n.8; *Kasten*, 563 U.S. at 16; *FCC v. ABC*, 347 U.S. at 296; *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion) (rule of lenity applied to interpretation of civil tax provision with criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment)

(agreeing that the rule of lenity applies); cf. *Clark*, 543 U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."). Indeed, in *Leocal*, the government itself acknowledged that deference to agency interpretation of a criminal statute is unwarranted even where that statute also has civil applications. See Brief for Respondent, *Leocal v. Ashcroft*, No. 03-583, 2004 WL 1617398, at *32-33 (U.S. July 14, 2004).

Application of the rule of lenity leaves no place for *Chevron* deference. Even if the *Chevron* framework were theoretically applicable to hybrid statutes, courts must apply the "traditional tools of statutory construction" *before* deeming a statute ambiguous and deferring to an agency's interpretation. *Chevron*, 467 U.S. at 843 n.9. This includes the rule of lenity. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (noting that lower court had "invoked no other rule of construction (*such as the rule of lenity*) requiring it to conclude that the statute was unambiguous" (emphasis added)); *Carter*, 736 F.3d at 732 (Sutton, J., concurring) (noting that "*Chevron* accommodates rather than trumps the lenity principle"); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26, 68-69, 104 (1994) (explaining that lenity is a "substantive canon" of statutory construction).

At the very least, the rule of lenity must take precedence over *Chevron* in cases involving "grievous" ambiguities—the standard this Court has set for application

of the rule. *E.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013). This is such a case: as Judge Sutton recognized, it is a "classic occasion for applying the rule of lenity." Pet. App. 21a. The key statutory phrase at issue in this case—"sexual abuse of a minor"—contains just five words and provides virtually no contextual guidance to courts, agencies, or lawyers. And the ordinary approach one would use to determine whether "sexual abuse of a minor" categorically encompasses the conduct criminalized by Penal Code section 261.5(c)—looking to the laws of the 50 States, the federal government, and the Model Penal Code—strongly suggests the answer is no. See Petr. Br. 15-21. At a minimum, under the rule of lenity, the statutory text is not sufficiently clear to permit a holding that Penal Code section 261.5(c) categorically defines an aggravated felony.

2. Applying the Rule of Lenity Rather than *Chevron* to Statutes with Both Civil and Criminal Applications Fulfills the Rule's Purposes and Protects Core Constitutional Values

Applying the rule of lenity in cases like this one dovetails with the rule's central purpose of requiring the government to provide "fair warning" of what the criminal laws prohibit. *Bass*, 404 U.S. at 348; *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Deferring to an agency's interpretation of a hybrid statute threatens to deprive the public of fair notice. The citizen must guess, among other things, whether a statute will be deemed ambiguous (courts often disagree) and

whether an agency's interpretation will be deemed reasonable (courts often disagree about this, too).

Exacerbating this problem, agencies routinely change their interpretation of statutory provisions. Deference thus would "allow one administration to criminalize conduct within the scope of the ambiguity, the next administration to decriminalize it, and the third to recriminalize it." *Carter*, 736 F.3d at 729 (Sutton, J., concurring). If the meaning of hybrid statutes could shift with the political winds, individuals could find themselves facing criminal prosecution (or enhanced punishment) based on new agency pronouncements for actions that were perfectly legal (or were punished less harshly) just weeks or months earlier. As applied in criminal cases, that would violate the Ex Post Facto Clause. See *Peugh v. United States*, 133 S. Ct. 2072, 2081 (2013). And the problem of "lack of fair notice," which is one of the "central concerns of the *Ex Post Facto* Clause," *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), is a serious one in the immigration context as well, given instabilities in the BIA's interpretations of many statutory provisions. See, *e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 488 (2011) (unanimously rejecting the BIA's interpretation while noting that the "BIA repeatedly vacillated" in determining whether § 212(c) of the INA permits the Attorney General to grant discretionary relief to a deportable non-citizen).

This fair-notice problem, moreover, must also be viewed in the context of the increasing number and reach of criminal laws since the middle of the twentieth century. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 783-84 (1997). There are so many federal crimes now that it is diffi-

cult to count them, but there are at least several thousand. See, *e.g.*, JOHN S. BAKER, JR. ET AL., THE FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004) (estimating that the U.S. Code contains over 4,000 criminal statutes).

In this setting, the rule of lenity helps "minimize the risk of selective or arbitrary enforcement." *Kozminski*, 487 U.S. at 952; see also Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 406 (noting that the rule of lenity "reduce[s] the opportunities for prosecutorial abuse"). By contrast, layering *Chevron* deference atop the increasingly broad array of federal criminal laws would give the government substantial power to engage in selective prosecution based on obscure administrative pronouncements. "[W]hen the criminal code comes to cover so many facets of daily life, ... prosecutors can almost choose their targets with impunity," Neil M. Gorsuch, *Law's Irony*, 37 Harv. J.L. & Pub. Pol'y 743, 748 (2014), a problem compounded when *Chevron* deference is afforded to the government's interpretations of expansive hybrid laws. Individuals disfavored by the government for one reason or another could well become the target of prosecutions based on ambiguous statutes. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2-5 (2011).

Applying the rule of lenity rather than *Chevron* deference also accords with another main purpose of the rule: protection of the separation of powers. This Court has recognized that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of

the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

That principle would ring hollow if courts deferred to agency interpretations of hybrid statutes. Doing so would give Executive Branch officials the power to "in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting denial of certiorari); see also *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (noting that deference would "giv[e] unelected commissioners and directors and administrators carte blanche to decide when an ambiguous statute justifies sending people to prison"). It would also "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring in the judgment).

Indeed, applying *Chevron* deference rather than the rule of lenity would contravene two related lines of this Court's precedent pertaining to the separation of powers. For over one hundred years, the Court has consistently explained that the Constitution allows Congress to delegate authority to the Executive to define crimes only when it speaks clearly. See, *e.g.*, *United States v. Grimaud*, 220 U.S. 506 (1911); *United States v. Eaton*, 144 U.S. 677, 688 (1892). While unclear delegation by Congress is no obstacle to agency rulemaking (or to *Chevron* deference) in the ordinary civil context, see *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013), the clear-statement rule "compels Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority" in the criminal law context. *Carter*,

736 F.3d at 733 (Sutton, J., concurring). Deferring to agency interpretations of ambiguous statutes with criminal applications would impermissibly allow agencies to make conduct criminal without a clear statement from Congress giving the agency that authority.

Similarly, while delegation to agencies requires only an "'intelligible principle'" in the ordinary civil context, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), this Court has suggested that the Constitution may require "something more than an 'intelligible principle'" when it comes to a delegation of authority to criminalize conduct—something that "meaningfully constrains" the Executive may be needed. *Touby v. United States*, 500 U.S. 160, 165-66 (1991); *Yakus v. United States*, 321 U.S. 414, 423-27 (1944). But under the Sixth Circuit's approach here, "an agency could fill a gap in a criminal statute even where Congress provides no specific guidance about how to fill it." See *Carter*, 736 F.3d at 734 (Sutton, J., concurring).

C. *Babbitt*'s Footnote Does Not Command a Contrary Result

Contrary to what the Court of Appeals believed (see Pet. App. 9a), this Court's opinion in *Babbitt* provides no basis to depart from the well-established principles discussed above. In *Babbitt*, the Court rejected the "argu[ment] that the rule of lenity should foreclose any deference to the Secretary [of the Interior]'s interpretation" of the statutory term "take" in the Endangered Species Act. 515 U.S. at 704 n.18. The Court stated that it had "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."

Id. For several reasons, this "drive-by" footnote "deserves little weight," *Whitman*, 135 S. Ct. at 354 (Scalia, J., statement respecting the denial of certiorari), and should not guide this Court's analysis.

Most importantly, reading the *Babbitt* footnote broadly "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Id.* at 353-54 (citing *Leocal*, 543 U.S. at 11-12 n.8 and *Thompson/Center Arms Co.*, 505 U.S. at 518 n.10 (plurality opinion)). And this "Court does not normally overturn, or ... dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). To the extent the *Babbitt* footnote may be considered to have done so, it can and should be overruled. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 37-38 (1991) (Scalia, J., concurring in the judgment) (in such a situation, there is "no valid *stare decisis* claim").

Indeed, this Court itself has evinced uncertainty about whether—even in the context of environmental regulation—the *Babbitt* footnote should be taken at face value. Six years after *Babbitt*, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the petitioner argued that "[b]ecause violations of the [Clean Water Act] carry criminal penalties, ... the rule of lenity" provided "another basis for rejecting the [government's] interpretation of the [Act]." *Id.* at 174 n.8. The Court opted to "not address this alternative argument" in light of its ruling in the petitioner's favor on other grounds. *Id.* If *Babbitt* had resolved the issue, the Court could simply have said as much, rather than declining to address it.

Alternatively, the *Babbitt* footnote should be limited in any of several ways that would help restore the proper relationship between *Chevron* and the rule of lenity in this case and others like it.

First, the *Babbitt* footnote emphasized that the regulation at issue in that case had "existed for two decades," giving a "fair warning of its consequences." 515 U.S. at 704 n.18. *Babbitt* also distinguished *Thompson/Center Arms Co.* on the ground that "no regulation was present" in that case. *Id.* Here, as in *Thompson/Center Arms Co.* and unlike in *Babbitt*, there is no regulation and no fair warning. The agency interpretation here arises from "case-by-case adjudication," Pet. App. 15a, and was not issued until 2015, postdating petitioner's crime by nearly six years, *id.* at 27a-28a. Given that the conduct at issue is entirely legal in 43 states, is a felony in just three, and is deemed "sexual abuse" in just one (Oregon, where it is punishable only as a misdemeanor), see Petr. Br. 20-21; Pet. 25-27 & n.7; Or. Rev. Stat. § 163.415, it was hardly foreseeable that the BIA would later by adjudication deem the crime to be "sexual abuse of a minor" constituting an "aggravated felony."

Second, the *Babbitt* footnote emphasized that that case involved a "facial challenge[]" to the agency's regulation, not any "specific factual dispute" in a particular case. 515 U.S. at 704 n.18. As Judge Sutton has noted, that is not the sort of setting in which one would expect the rule of lenity to come into play to begin with. Facial challenges are "the sorts of claims that raise arguments—say that the regulation exceeded the agency's authority and thus was unenforceable in all its applications—that have no connection to the rule of lenity." Pet. App. 23a-24a; see also *Carter*, 736

F.3d at 735 (Sutton, J., concurring) (similar). This case does not involve a facial challenge.

Third, in *Babbitt*, Congress *had* expressly made it a crime to violate any "regulation issued in order to implement" the various statutory provisions at issue. See 16 U.S.C. § 1540(b)(1). As a result, two of the main concerns stemming from deference to agency interpretation of hybrid statutes—the clear-statement rule and the nondelegation doctrine, see *supra* pp. 15-16—were not implicated, and the separation-of-powers concern carried far less weight. Here, by contrast, no statute contemplates that the BIA's pronouncements will carry criminal consequences. See Petr. Br. 43-44.

II. EVEN IF THE *CHEVRON* FRAMEWORK APPLIES, DEFERENCE TO THE BIA'S INTERPRETATION IS NOT WARRANTED HERE

Even if the *Chevron* framework may apply to agency interpretations of some hybrid statutes, deference is not appropriate in this case. This is so, above all, because the BIA's interpretation is not a reasonable one and reflects a fundamental misapplication of the categorical approach. See Petr. Br. 14-34, 44-47. Amicus highlights two additional reasons why, even under the *Chevron* framework, no deference is warranted here.

A. The BIA Does Not Administer Criminal Laws and Lacks Relevant Criminal Law Expertise

Chevron deference rests, in significant part, on respect for "practical agency expertise" in the subject matter of the statute the agency it administers. *Pension Benefit Guaranty Corp.*, 496 U.S. at 651-52; see

also *Chevron*, 467 U.S. at 863-65. Considerations of agency expertise in this case, however, confirm that no deference is warranted.

Under *Chevron*, courts may afford deference to an agency's interpretation of a "statute which it administers." 467 U.S. at 842. But agencies do not "administer" criminal laws. Courts alone are charged with that responsibility. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."). Indeed, this Court has "*never* held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (emphasis added). The same is true of hybrid statutes with civil and criminal applications. See, *e.g.*, *Crandon*, 494 U.S. at 177 (Scalia, J., concurring in the judgment) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). To be sure, the BIA administers the civil provisions of the INA, but it does not (and cannot) administer those laws in their criminal settings. See, *e.g.*, *id.* (explaining that administrative necessity is "not the sort of specific responsibility for administering the law that triggers *Chevron*").

Chevron itself shows why courts should not defer to the BIA's interpretation here. This Court explained in *Chevron* that, in administering the Clean Air Act, the Environmental Protection Agency is charged with "implementing policy decisions in a technical and complex arena." 467 U.S. at 863. The Court observed that "[p]erhaps" Congress left to the agency the ability to "strike the balance" between competing interests in this area because "those with great expertise and charged with responsibility for administering [the law]

would be in a better position to do so." *Id.* at 865. By contrast, "[j]udges" were "not experts in the field." *Id.*

The situation here is far different. As several courts of appeals have recognized, "[t]he BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir. 2009); see also, *e.g.*, *Efstathiadis v. Holder*, 752 F.3d 591, 594 (2d Cir. 2014); *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001). That is especially true here. The phrase "sexual abuse of a minor" is not an immigration term of art. Rather, as this Court has recognized, it is a "generic crime[]" that calls for application of the categorical approach. *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009).

The categorical approach is difficult enough for courts to apply. See, *e.g.*, *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (noting that lower court's "new way" of applying the categorical approach "has no roots in our precedents"). But it is at least the sort of legal-reasoning task in which courts have expertise. By contrast, there is no reason to believe executive agencies have any such expertise, and every reason to doubt whether they do, as this case illustrates.

The BIA's application of the categorical approach here would have earned it an "F" in law school. The BIA relied on non-legal sources and its own policy beliefs rather than consulting state and federal criminal laws and the Model Penal Code. See Petr. Br. 9-10. The BIA also considered it "noteworthy" that "[i]f we were to conclude that the offense at issue here is not categorically 'sexual abuse of a minor,' sexual offenders who were prosecuted under this statute for victimizing

children under the age of 16 would not be removable for having committed a 'sexual abuse of a minor' aggravated felony under the Act." Pet. App. 39a n.7. That flawed reasoning turns the categorical approach on its head. Rather than considering "'the least of the acts' criminalized" under Penal Code section 261.5(c)," *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013), and comparing that conduct to the generic offense, the BIA identified the *most* culpable conduct and justified its categorical treatment of section 261.5(c) on that basis.

Such errors show why the BIA has not offered a permissible construction of the statute—and why its constructions of section 1101(a)(43) are not proper candidates for *Chevron* deference in the first place.

B. Affording *Chevron* Deference to the BIA's Interpretation Would Create Significant Practical Difficulties for Criminal Defense Lawyers and Their Clients

One final reason for not deferring to the BIA's interpretation of section 1101(a)(43) is to ensure that the provision is interpreted consistently over time, especially in its criminal applications. Because of the unique constitutional obligations placed on criminal defense counsel, affording *Chevron* deference to the BIA's interpretation of criminal laws will place an immense burden on attorneys, to the detriment of their clients.

Under *Padilla*, 559 U.S. at 367, defense attorneys are required to advise their clients of the immigration consequences of plea agreements. The categorical approach facilitates the performance of this duty: it

"works to promote efficiency, fairness, and predictability in the administration of immigration law" by enabling noncitizens and their attorneys "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (alterations and internal quotation marks omitted).

Affording *Chevron* deference to the BIA's interpretation would eliminate those benefits and would increase exponentially the difficulties criminal defense attorneys would face in advising their clients of the immigration consequences of criminal convictions. Immigration law is "quite complex" to begin with, and that is particularly true with respect to "the determination of whether a crime is an 'aggravated felony.'" *Padilla*, 559 U.S. at 377-78 (Alito, J., concurring in the judgment); see also *id.* at 378 ("'[N]othing is ever simple with immigration law'" (quoting R. MCWHIRTER, ABA, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 130 (2d ed. 2006))). The difficulties criminal defense attorneys face would be magnified tenfold if the BIA's criminal law pronouncements received *Chevron* deference. Defense attorneys would be required to be aware of ever-shifting immigration law at the administrative level in order to provide effective assistance of counsel to their clients.

Indeed, the task is still more onerous: attorneys would have an obligation to try to *predict* the BIA's *future* rulings that might receive *Chevron* deference. In petitioner's case, for instance, his California conviction came nearly six years before the BIA's ruling. See

Pet. App. 27a-28a. Given the BIA's approach here—in which it relied upon an article in the *Journal of Family Planning Perspectives* in determining that petitioner's conviction constituted "sexual abuse of a minor," Pet. App. 35a-36a—attorneys could well be forced to consult far-flung, non-legal sources in trying to predict the BIA's future treatment of crimes. And that difficulty is only exacerbated by the BIA's frequent efforts to apply its administrative rulings retroactively in other cases. See generally *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144-45 (10th Cir. 2016).

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

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JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*

The National Immigrant Justice Center and the American Immigration Lawyers Association respectfully submit this brief as *amici curiae* to alert the Court to the severe—and unintended—consequences that the government's expansive reading of the aggravated-felony statute would create.[1]

Congress knows well that deportation causes great hardship. Deportation divides families and can deprive them of their means of support. It separates children from their parents. And it can expose the deported person to a risk of persecution and death upon return to his or her country of origin. In recognition of these hardships—and in acknowledgement of our Nation's obligations under the 1967 Protocol Relating to the Status of Refugees—Congress has created several avenues for individuals facing deportation to seek relief. Among these are laws providing for cancelation of removal and asylum, which grant immigration judges discretionary authority to halt removal in cases where the nation's interests and values would be better served by allowing the noncitizen to remain in the United States. See 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); *id.* §§ 1229b(a)(3), (b)(1)(C). Congress intended these avenues for relief to be open even if the individual has been convicted of a crime—unless the crime is an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief, in letters that are on file with the Clerk or submitted contemporaneously with this brief.

The government would block access to these avenues for requesting relief from removal by urging an expansive definition of "aggravated felony." The question before the Court is whether convictions under the seven state statutes that criminalize consensual sexual intercourse between a 21-year-old and a 17-year-old or a 20-year-old and a 16-year-old (such as California Penal Code § 261.5(c)) constitute the "aggravated felony" of "sexual abuse of a minor" under Section 1101(a)(43)(A)—and therefore constitute grounds for mandatory removal. As a matter of statutory interpretation, the answer is no.

Among other reasons, petitioner has explained that, under the categorical approach this Court outlined in *Taylor* v. *United States*, 495 U.S. 575 (1990), statutes like California Penal Code § 261.5(c) fall well outside the definition of "aggravated felon[ies]." *Amici* agree with petitioner in all respects.

Amici submit this brief to elaborate on one particular reason why petitioner is correct: the government's interpretation of the aggravated-felony statute contravenes this Court's longstanding rule that ambiguities in deportation statutes should be construed in favor of the noncitizen because of the severity of the consequences of deporting immigrants whom Congress intended to be permitted to seek permission to remain. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001). This canon of statutory construction is sometimes called the rule of "immigration lenity." *E.g.*, Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 26-33 (2013).

The government's reading of Section 1101-(a)(43)(A) would jettison this principle. As a practical matter, the government's reading would expand the

category of "aggravated felonies" to include conduct that is not aggravated, is not a felony, and, in many states, is not even criminalized. *Amici* agree with petitioner that the government does not point to anything in the text or legislative history of the statute demonstrating that Congress intended such an arbitrary and counterintuitive result, and that the government's rationale flouts the rule of lenity applied in both criminal and immigration cases. Petr. Br. 14-29, 38-43, 45-48.

The government's approach also runs counter to the statutory structure, which vests immigration judges with discretion to decide eligibility for asylum and cancellation of removal in most cases. The government's assertion that conduct governed by low-level statutes such as Section 261.5(c) constitutes an "aggravated felony" would prevent immigration judges from weighing the equities in precisely the sorts of cases that Congress intended them to have discretion. To the extent that doubt remains, the rule of immigration lenity applies—weighing conclusively against the government's arbitrary and counterintuitive approach.

Amici have a deep understanding of the practical implications of this case for individuals who find themselves in removal proceedings. The National Immigrant Justice Center (NIJC) is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually.

This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of noncitizens generally and as the leader of a network of pro bono attorneys who regularly represent noncitizens in court. Given NIJC's experience and perspective, it is well-situated to assist the Court in understanding how the "aggravated felony" issue will impact individuals fleeing religious and political persecution, as well as how it will affect others seeking relief from deportation after spending most of their lives here.

The American Immigration Lawyers Association (AMA) is a national organization composed of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a *pro bono* basis.

Amici share a significant interest in ensuring the fair administration of federal immigration laws. As leaders in the field and as advocates for the rights of immigrants and refugees, *amici* are uniquely qualified to address the practical consequences of the government's position in this case and how those conse-

quences underscore the need to apply this Court's rule of immigration lenity.

SUMMARY OF ARGUMENT

1. This Court has long recognized that provisions of deportation statutes (like the "aggravated felony" definition) should be construed in favor of the noncitizen because the consequences of removal are so harsh. This canon of construction—sometimes known as "the rule of immigration lenity" (*e.g.*, Scharf, 66 Rutgers L. Rev. at 26)—has particular force where the provision under consideration "was designed to accomplish a humanitarian result" (*INS* v. *Errico*, 385 U.S. 214, 225 (1966)). That is the case here. The statutes providing for cancellation of removal and asylum were designed to avoid overly harsh results, protect the interests of United States citizens who would suffer due to a noncitizen's removal, and honor our country's commitment to international law. Where ambiguous, these statutes should be interpreted in favor of the noncitizen.

2. The government proposes an overly-broad reading of "aggravated felony," one that would sweep in minor offenses, including conduct that many states do not even forbid. As petitioner demonstrates, only seven states criminalize consensual sexual intercourse between a 21-year-old and a 17-year-old or between a 20-year-old and a 16-year-old. Petr. Br. 20-21. Of the seven states that criminalize this conduct, only two states have chosen to designate that crime a "felony." *Id.* at 33. And regardless of the felony or misdemeanor designation, states tend to place such offenses on the lower rungs of the punitive hierarchy. Arizona, for example, criminalizes sexual conduct with older minors as a "class 6 felony" punishable by as little as four months of incarceration.

Ariz. Rev. Stat. Ann. §§ 13-1405, 13-702(D). As a result of this low-level treatment, many individuals who would be designated "aggravated felons" under the government's definition received only a minor custodial sentence for their underlying conviction—or no jail time at all.

Amici agree with petitioner that *Taylor* forecloses the determination that conduct criminalized in only seven jurisdictions constitutes an "aggravated felony" under Section 1101(a)(43). See *Taylor* v. *United States*, 495 U.S. 575, 598 (1990) (relying on the law of the majority of states, the federal government, and the Model Penal Code to determine a generic definition of the offense at issue). If the Court nonetheless finds the aggravated-felony provision at issue here ambiguous, the Court should apply the longstanding rule on interpreting ambiguities in deportation statutes in favor of the noncitizen. This principle is especially pertinent here because the title and nature of the aggravated-felony statute suggest that Congress intended to exclude low-level conduct, such as the conduct covered by California Penal Code § 261.5(c). With such commonsense indicators trending towards exclusion, to read the statute otherwise would be counterintuitive—a result that the principle of lenity is designed to avoid.

3. Finally, a narrow reading of the "aggravated felony" category is supported by the statutory structure, which makes access to discretionary relief the rule—not the exception—for long-term permanent residents. This structure reflects a congressional determination that, in most cases, immigration judges should have discretion to assess the gravity of an offense under the circumstances. For example, for cancellation of removal, the relevant circumstances may

include prior criminal records (or lack thereof), whether the offense was minor or serious, how long ago it was committed, and whether the applicant has been rehabilitated—along with other factors such as military service, character, family ties, employment history, and hardship to family members. Immigration judges are well-suited to make these sorts of determinations, exercising discretion based on the totality of circumstances. The government's interpretation of Section 1101(a)(43) would prevent the exercise of discretion in cases that merit relief, demanding deportation in circumstances where it is manifestly unwarranted.

ARGUMENT

I. THE COURT CONSTRUES DEPORTATION STATUTES IN FAVOR OF THE NONCITIZEN BECAUSE THE CONSEQUENCES OF REMOVAL ARE SO HARSH.

This Court has recognized a "longstanding principle" of "construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). This principle ensures that the harsh consequences resulting from deportation are visited only upon those whom Congress truly intended to be subject to removal. Because "deportation is a drastic measure and at times the equivalent of banishment [or] exile," this Court "will not assume that Congress meant to trench on [a noncitizen's] freedom beyond that which is required by the narrowest of several possible meanings of the [statutory language]." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948).

This canon of construction is rooted in the same fundamental notions of fairness and due process underlying the doctrine of criminal lenity. If an ambiguity in a deportation statute regarding the impact of a past offense on removability were suddenly interpreted against noncitizens, the effective penalty for that offense would be retroactively increased. But as this Court has explained, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). Indeed, this Court has repeatedly relied upon the criminal rule of lenity in immigration cases. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Even if [the statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in [the noncitizen's] favor," whether "in a criminal or noncriminal context."); *Bonetti* v. *Rogers*, 356 U.S. 691, 699 (1958) ("ambiguity" in Anarchist Act of 1918 must be "resolved in favor of lenity" (quoting *Bell* v. *United States*, 349 U.S. 81, 83 (1955))).[2]

As petitioner here has demonstrated, whether to adopt the government's interpretation of the phrase "aggravated felony" in Section 1101(a)(43)(A)—which would sweep in offenses under the laws of a handful of states criminalizing sexual contact between 21 and

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[2] *Amici* agree with petitioner that, as a hybrid statute with criminal and civil implications, the aggravated felony definition is subject to criminal lenity. Petr. Br. 38-43. But even without considering the rule of criminal lenity, the results in *Leocal* and *Bonetti* were consistent with—and required by—this Court's rule that deportation statutes should be interpreted in favor of the noncitizen.

17 year olds—is not a close question. Petr. Br. 14-35. But even if the issue were in doubt, this Court's rule of lenity for immigration statutes requires that doubt to be resolved against the government's position.

Like the provisions addressed in *St. Cyr* and *Fong Haw Tan*, the "aggravated felony" provisions at issue here impose devastating consequences on lawful permanent residents and asylum seekers alike. A person convicted of an "aggravated felony" is deportable under 8 U.S.C. § 1227(a)(2)(A)(iii). Moreover, when deportation proceedings are instituted on the basis of an aggravated felony, removal is mandatory; the noncitizen cannot seek discretionary relief such as asylum or cancellation of removal. *Id.* §§ 1158-(b)(2)(A)(ii), (B)(i); *id.* §§ 1229b(a)(3), (b)(1)(C). Even worse, because courts have imposed no statute of limitations or *ex post facto* protections to limit these consequences, a noncitizen may be deported based on the subsequent reclassification of an offense as an aggravated felony many years after the offense was actually committed. See *id.* §§ 1227(a)(2)(A)(iii); see also, *e.g.*, *Perriello* v. *Napolitano*, 579 F.3d 135, 137 (2d Cir. 2009) ("We acknowledge the significant hardship that Perriello and his family will face as a result of the unaccountable delay in the decision to seek his removal decades after his conviction, and notwithstanding his evidently lawful and productive life in the interval."); *Kuhali* v. *Reno*, 266 F.3d 93, 110-111 (2d Cir. 2001) (similar).

The rule of immigration lenity has particular force where, as here, the statute at issue "was designed to accomplish a humanitarian result." *INS* v. *Errico*, 385 U.S. 214, 225 (1966). *Errico* involved an INA provision providing for removal of noncitizens who had originally procured entry into the United

States by fraud. *Id.* at 215. The provision contained an exception for the spouse, parent, or child of a United States citizen or lawful permanent resident so long as the person seeking an exception had been "otherwise admissible at the time of entry." *Ibid.* The Court interpreted the term "otherwise admissible" in favor of the noncitizen,[3] explaining that the exception should be read broadly "in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens." *Id.* at 225.

The statutes providing for cancellation of removal and asylum mirror the structure of the provision analyzed in *Errico*. They were enacted with humanitarian goals in mind: avoiding overly harsh results, protecting citizens who would suffer if a noncitizen were removed, and ensuring the safety of refugees fleeing persecution. The denial of a request for cancellation of removal or asylum results in the ultimate immigration consequence—deportation. Thus, where ambiguous, these provisions should be interpreted in favor of the noncitizen.

II. THE GOVERNMENT'S APPROACH WOULD READ "AGGRAVATED FELONY" TO COVER LOW-LEVEL OFFENSES FOR WHICH CONGRESS DID NOT INTEND TO IMPOSE MANDATORY REMOVAL.

This Court has cautioned against interpreting the "aggravated felony" provision to encompass of-

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[3] The Court held that a visa applicant who lied about his nationality to avoid quota restrictions was "otherwise admissible at the time of entry" even though disclosing his correct nationality would have resulted in the denial of his application. *Errico*, 385 U.S. at 224-225.

fenses that may be neither aggravated nor felonies—a result that "the English language tells us not to expect." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010). The government's approach in this case ignores that warning. Instead, the government proposes to interpret Section 1101(a)(43)(A) as sweeping in low-level offenses, including misdemeanors, involving conduct that is not even a crime in most jurisdictions. As petitioner demonstrates, federal law does not criminalize consensual sexual intercourse between a 21-year-old and someone who is almost 18. Petr. Br. 17-19. Nor does the Model Penal Code, and nor do the vast majority of states. *Id.* at 20-21. Indeed, while every state criminalizes sex between someone under 16 and a person more than four years older, only seven states criminalize the least-culpable conduct at issue here. *Ibid.*

The immigration consequences of an "aggravated felony" conviction are vastly disproportionate to the culpability associated with violations of statutes such as California Penal Code § 261.5(c). Of the seven States that criminalize consensual sexual intercourse between a 21-year-old and a 17-year-old, only two States have chosen to designate that crime a "felony." Ariz. Rev. Stat. Ann. § 13-1405; Idaho Code § 18-6101(2). Four states deem the offense a misdemeanor. N.D. Cent. Code § 12.1-20-05(1); Or. Rev. Stat. § 163.415(1); Va. Code Ann. § 18.2-371; Wis. Stat. § 948.09. And one (California) provides for felony or misdemeanor charges at the discretion of the prosecutor. Cal. Penal Code § 261.5(b). Although state-law felony and misdemeanor designations may not be themselves determinative of whether particular conduct is an "aggravated felony" under the INA, they are certainly relevant insofar as they reflect a considered determination by the States as to the na-

ture of consensual sexual intercourse between an older teenager and someone relatively close in age. States reasonably treat it as a low-level crime deserving of low-level punishment, not a sex-abuse crime meriting harsher criminal sanction.

It is instructive, moreover, that regardless of the felony or misdemeanor designation assigned, States tend to situate statutes such as California Penal Code § 261.5(c) on the lower rungs of the punitive hierarchy. Arizona, for example, criminalizes sexual conduct with older minors as a "class 6 felony" punishable by as little as 4 months of incarceration. Ariz. Rev. Stat. Ann. §§ 13-1405, 13-702(D). By contrast, sexual conduct with younger minors, such as a 13-year-old, is a class 2 felony punishable with between 3 and 12.5 years imprisonment—or even longer, depending upon the age of the perpetrator. *Id.* § 13-702(A), (C), (D). Thus, although Arizona applies the felony designation to sexual conduct with older minors—such as the 16-year-old at issue in this case—it does not treat such conduct as an "aggravated" felony and recognizes that felony-level punishment may not be appropriate in every case.

Similarly, although California Penal Code § 261.5(c) affords prosecutors discretion to determine whether a felony or misdemeanor charge is warranted, the statute as a whole allocates culpability differently based on the age of the child and the perpetrator. Compare Cal. Penal Code § 261.5(c) (minor more than three years younger than the perpetrator), with *id.* § 261.5(d) (minor younger than 16 when the perpetrator is 21 or older). Predictably, the section involving a wider age gap is subject to stricter sentencing guidelines. Cal. Penal Code §§ 261.5(d), 1170(h). For example, in this case, petitioner was 20 years old

when he had sexual contact with his 16-year-old girlfriend, and although he was charged with a felony violation of California Penal Code § 261.5(c), he was not charged with the higher offense of violating California Penal Code § 261.5(d). Petr. Br. 6.

Some States designate the relevant conduct a misdemeanor rather than a felony. Petr. Br. 33. But they also reserve harsher penalties for offenses involving sexual relationships with younger minors.[4]

As a result of this low-level treatment, many individuals who would be designated "aggravated felons" under the government's definition received only a minor custodial sentence for their underlying conviction, or no jail time at all. In some cases, for example, the criminal sentence was limited to probation or community service. See, *e.g.*, *People* v. *Benitez*, 2009 WL 1564963, at *1 (Cal. Ct. App. June 4, 2009) (three years of probation and no jail time).

Other cases involve minimal jail time. In one case, a noncitizen applying for asylum and cancellation of removal had been convicted at the age of 18 of a misdemeanor violation of California Penal Code § 261.5 resulting from his consensual relationship with his girlfriend. He was sentenced to 18 days in jail (with credit for 12 days of time served), along with three years of probation. Under the govern-

[4] See, *e.g.*, N.D. Cent. Code § 12.1-20-05 (sexual act with a minor age fifteen or older is a class A misdemeanor, unless the perpetrator is twenty-two years of age or older, in which case it is a class C felony); Wis. Stat. §§ 948.09, 948.02 (sexual intercourse with a minor age 16 or older is a Class A misdemeanor, but sexual intercourse with a minor under the age of 16 is a Class B or Class C felony, depending on the age of the child).

ment's approach, his offense would be deemed an "aggravated felony."[5]

In some cases, the sexual conduct at issue between the noncitizen and his teenage girlfriend falls well short of intercourse. See, *e.g.*, 18 Pa. Cons. Stat. § 3126(a)(8). Under the government's approach, offenses under these statutes too would be deemed to be aggravated felonies, despite the low-level nature of the conduct. See, *e.g.*, *Matter of Colon*, 2004 WL 2374484, at *1 (BIA 2004).

In short, the government's interpretation of Section 1101(a)(43) would deem conduct that few states criminalize and that often receives only minor penalties in the handful of states that do prohibit it as an "aggravated felony." That counterintuitive result confirms that the government is mistaken. But even if there were any doubt, that doubt should be resolved in favor of petitioner, in accordance with this Court's longstanding rule that ambiguities should be resolved in favor of the noncitizen.

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[5] California prosecutors report exercising their discretion to choose between felony and misdemeanor charges by charging what they perceive to be low-culpability cases as misdemeanors, thereby further mitigating the consequences of conviction. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 730-731 (2006) (compiling in-person interviews and survey data from district attorneys' offices across California). Characteristics that may warrant misdemeanor treatment include cooperation by the defendant, supportive behavior by the defendant—*e.g.*, child support or marriage—and the absence of violence, pregnancy, multiple victims, manipulation, coercion, or a position of trust. *Ibid.* Additionally, many "[c]ases with sixteen and seventeen year-old victims or twenty year-old defendants * * * are treated as misdemeanors or result in lenient sentences." *Id.* at 744.

III. THE GOVERNMENT'S APPROACH WOULD DEPRIVE IMMIGRATION JUDGES OF DISCRETION TO CONSIDER CANCELLATION OF REMOVAL OR ASYLUM IN APPROPRIATE CASES.

Any lingering uncertainties on the question presented are further "clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, the statutory structure confirms that petitioner's reading of the statute is correct.

Congress drafted immigration law to avoid overly harsh results while still permitting the effective policing of our Nation's borders. To achieve these goals, Congress provided immigration judges with discretion to make judgment calls in light of the facts and circumstances of the case. But an "aggravated felony" conviction removes that discretion, mandating removal regardless of how compelling the countervailing equities may be. To read such a provision broadly would upset the statutory scheme because it would divest immigration judges of discretion in precisely the sorts of cases where exercise of discretion is most warranted. This is not a result that Congress could have intended.

A. An "aggravated felony" finding precludes cancellation of removal or asylum.

1. As petitioner's case demonstrates, a determination that a particular offense is an "aggravated

felony" has catastrophic consequences, even for long-standing lawful permanent residents of the United States. For example, a person convicted of an aggravated felony may not seek "cancellation of removal." 8 U.S.C. § 1229b(a). Cancellation of removal is a form of discretionary relief through which individuals who have lived in the United States for at least seven years following their admission, and who have been lawful permanent residents for at least five years, may request an order allowing them to stay in the United States. Equitable factors relevant to an immigration judge's exercise of discretion under this provision include family ties within the United States, residency of long duration, evidence of hardship to the respondent and family if deportation occurs, service in the Armed Forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and evidence attesting to a respondent's good moral character. See, *e.g.*, *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998); *Matter of Wadud*, 19 I. & N. Dec. 182, 186-187 (BIA 1984); *Matter of Marin*, 16 I. & N. Dec. 581, 584-585 (BIA 1978).

Congress's provision for cancellation of removal reflects its understanding that the consequences of removal are felt as much by the noncitizen's family, friends, and community as by the noncitizen himself. Deporting a child's mother or father breaks apart a family forever and may leave young American citizens to fend for themselves or in foster care, from whence they face "formidable barriers to reunification with their families." SETH FREED WESSLER, APPLIED RESEARCH CENTER, SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011) (of-

fering a "conservative[] estimate[]" of "at least 5,100 children currently living in foster care whose parents have been either detained or deported"). The effects of deportation are most pronounced in lower-income families that cannot afford to travel back and forth between the United States and their country of origin to visit loved ones.

For a lawful permanent resident such as petitioner, who has lived in this country for his entire adult life, deportation is among the most extreme punishments possible. It amounts to permanent exile from the only home he has ever known. Many of these noncitizens have spent their entire lives in the United States and do not even remember their time in the nation to which they are being deported.[6] As Learned Hand once observed:

> [W]e think it not improper to say that deportation under the circumstances would be de-

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[6] See, *e.g.*, *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 180 (5th Cir. 2008) (lawful permanent resident ("LPR") since 1977, 30 years in U.S.); *Lopez-De Rowley* v. *INS*, 253 F. App'x 62, 64 (2d Cir. 2007) (LPR since 1970); *Knutsen* v. *Gonzales*, 429 F.3d 733, 735, 739-740 (7th Cir. 2005) (LPR since 1957); *Chang* v. *INS*, 307 F.3d 1185, 1187-1190 (9th Cir. 2002) (LPR since 1975); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Valenzuela-Zamorano* v. *Ashcroft*, 11 F. App'x 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral* v. *INS*, 977 F.2d 33, 34 (1st Cir. 1992) (LPR since age two); *Shurney* v. *INS*, 201 F. Supp. 2d 783, 786 (N.D. Ohio 2001) (entered U.S. at age three); *Minto* v. *Mukasey*, 302 F. App'x 13, 13 (2d Cir. 2008) (entered U.S. at age eight); *Fernandez* v. *Mukasey*, 544 F.3d 862, 864-865 (7th Cir. 2008) (two LPRs, one in the U.S. since age nine, another in the U.S. for over 40 years); *Matter of Flores-Gomez*, 2004 WL 2374449, at *1 (BIA 2004) (admitted to U.S. in 1943).

> plorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in [his country of origin] as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.

United States ex rel. Klonis v. *Davis*, 13 F.2d 630, 630 (2d Cir. 1926); accord *Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (removal means "a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens").

Under the government's approach, a 21-year-old who engages in consensual sexual intercourse with a 17-year-old and is convicted under a statute like California Penal Code § 261.5(c) would be statutorily barred from seeking cancellation of removal. Such a noncitizen would have no opportunity to argue that, as a matter of equity, he should be allowed to remain in this country; or to present evidence of family ties, history of employment, proof of rehabilitation, and good moral character. He would, instead, face automatic deportation—no matter how long he had lived in the United States; no matter how minimal and remote his connections to his country of origin; and no matter how many people in the United States depend on him for support.

Under petitioner's approach, by contrast, immigration judges would have the leeway to consider these factors and to grant relief when warranted. Conversely, in those cases where the conduct of conviction is truly objectionable, immigration judges would be able to exercise their discretion to deny cancellation. There is, accordingly, no reason to be concerned that petitioner's reading of the statute would result in fewer deportations of those whom Congress truly meant to deport.

2. The practical, human consequences of the government's approach to the question presented are, for these reasons, deeply troubling. Take, for example, individuals who have served in the U.S. Armed Forces. For any lawful permanent resident who finds himself in removal proceedings, a record of military service would ordinarily weigh in favor of granting cancellation of removal. Many lawful permanent residents serve in the U.S. military, and the linguistic and cultural diversity they bring to their service is especially valuable in the context of national security. See, *e.g.*, Anita U. Hattiangadi et al., CNA Corp., Non-Citizens in Today's Military: Final Report 1 (2005). Indeed, in recognition of the benefits that noncitizens offer the military, the government has made a concerted effort "to provide services and opportunities to service members, veterans, and their families interacting with the U.S. immigration system." Barack Obama, Presidential Memorandum—Supporting New American Service Members, Veterans, and their Families (Dec. 22, 2016). Since 2001, over 110,000 service members have been naturalized. *Ibid.* But many more service members remain noncitizens. Under the government's position, however, a veteran who violated California Penal Code § 261.5(c)—no matter how long ago, and no matter

the circumstances—would have no opportunity to argue for cancellation of removal based upon military service or the hardship that removal would present to his or her family or community.

3. An aggravated-felony conviction also permanently blocks a noncitizen from seeking asylum in the United States based on a well-founded fear that he or she will face persecution or death if returned to his or her country of origin. The history of refugee protection in the United States demonstrates that a noncitizen should be barred from this relief only if his or her crime was "particularly serious." *Konou* v. *Holder*, 750 F.3d 1120, 1127 (9th Cir. 2014).

Congress enacted the current asylum system in the United States more than 40 years ago, when the United States acceded to the Protocol Relating to the Status of Refugees. Under the Protocol, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *INS* v. *Stevic*, 467 U.S. 407, 416 (1984). Article 33 of the Convention—incorporated by reference and reproduction into the Protocol—"provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). It states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

PROTOCOL RELATING TO THE STATUS OF REFUGEES art. 33, Jan. 31, 1967, 19 U.S.T. 6223.

Article 33 also describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of *a particularly serious crime*, constitutes a danger to the community of that country.

CONVENTION RELATING TO THE STATUS OF REFUGEES art. 33(2), July 28, 1951 189 U.N.T.S. 150 (emphasis added).

In recognition of the Protocol and Convention, Congress made a series of changes to the INA, including to add a provision codifying the method by which a refugee can apply for asylum. 8 U.S.C. § 1158; *Cardoza-Fonseca*, 480 U.S. at 423. Asylum is a form of discretionary relief that allows the noncitizen to stay and work legally in the United States, seek derivative asylum status for family members, and ultimately seek permanent residence and citizenship. See, *e.g.*, 8 U.S.C. § 1158.9; 8 C.F.R. § 209.2.

Congress also incorporated language that tracks the exception in the second paragraph of Article 33. Thus, it placed asylum off-limits for any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii). Congress

further defined "particularly serious crime" to include any "aggravated felony." *Id.* § 1158(b)(2)(B)(i).

Under these provisions, any person convicted of an "aggravated felony" is statutorily barred from seeking asylum, regardless of the severity of the threat faced upon return to the country of origin, and regardless of the circumstances surrounding the offense. This statutory bar can and does result in the deportation of noncitizens to countries where they face imminent harm.[7] Yet under the government's approach, even very minor state convictions would trigger these severe consequences.

B. The statutory structure indicates that Congress intended to give immigration judges discretion to resolve cases like this one.

The structure of the INA reflects Congress's judgment that, in most cases, the exercise of discretion is the best way to assess the gravity of an offense. A broad interpretation of the "aggravated felony" definition would undermine this structure by mandating removal in cases where the circumstances indicate removal is inappropriate.

By contrast, a narrow reading of "aggravated felony" preserves an immigration judge's discretion to deny relief in truly aggravated cases calling for removal. Petitioner's interpretation of "aggravated felony" would not cause dangerous criminals to "escap[e] deportation." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). Rather, it would shift more in-

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[7] See, *e.g.*, *Berhe* v. *Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006) (even in the face of severe religious persecution in an Eritrean national's country of origin, access to relief depended in the first instance on whether prior conviction was an aggravated felony).

dividuals to the discretionary category, where immigration judges and the BIA can make individualized assessments of whether removal is appropriate. *Ibid.* With respect to crimes for which Congress has not clearly mandated removal, the later result is more consistent with the statutory scheme and the ends of justice, as discretionary relief may still be granted or denied, depending upon the circumstances.

Experience under the Ninth Circuit rule shows that the government's interpretation of Section 1101(a)(43) would prevent the exercise of judicial discretion in cases that merit relief—an outcome that cannot be squared with the statutory scheme.

Consider the case of D.M.—one of many immigrants who have convictions under low-level statutory rape statutes such as California Penal Code § 261.5(c).[8] In 1992, D.M. was convicted of violating § 261.5 because of his relationship with his girlfriend. At the time of his arrest, D.M. was 20 and his girlfriend was 16. D.M. was sentenced to probation and, shortly after his conviction, he and his girlfriend were married. D.M. and his wife had two children and lived together as a family for 15 years, before divorcing in 2007. His ex-wife trusted him enough to grant him custody of both children, who still live with him. D.M. was granted lawful permanent resident status in 2006, and he naturalized in 2013. Yet under the government's interpretation of Section 1101(a)(43), D.M.'s decades-old conviction would have been deemed to be an "aggravated felony," rendering him ineligible for naturalization.

Other similar examples abound. For instance, Gustavo H. pleaded guilty to a misdemeanor viola-

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[8] See *Matter of D-M-*, 2016 WL 316705, at *1 (AAO 2016).

tion of California Penal Code § 261.5(c). He received a suspended sentence and three years of probation. After the conviction, Gustavo and his girlfriend were married. When their child was three years old, Gustavo was able to adjust his immigration status based on his marriage—an adjustment that was made possible only by the Ninth Circuit's holding in *Estrada-Espinoza*, which held that violations of Section 261.5(c) are not "sexual abuse of a minor" for purposes of the INA. *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1150 (9th Cir. 2008). Gustavo's naturalization interview occurred after the BIA issued *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469, 470 (BIA 2015); thanks to *Estrada-Espinoza*, Gustavo was able to demonstrate good moral character notwithstanding his conviction under § 261.5(c). Now that Gustavo is a U.S. citizen, he can continue to provide for his family. By contrast, under the government's approach in this case, Gustavo would have been forever denied U.S. citizenship and potentially subject to removal, depriving his family of support.

Jurisdictions that interpret the "aggravated felony" definition to include these types of offenses separate families and impose significant hardships on family members, including children, who are left behind in the United States.[9] A noncitizen who we will call Smith came to the United States from Mexico when he was 13 years old. He qualified for Deferred

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[9] As explained in Part II, *supra*, only seven states criminalize consensual sexual intercourse between a 21-year-old and someone just under 18. Not all of the stories *amici* present below are taken from those seven states. But the examples of noncitizens from other states are illustrative both of the human element of the disputed conduct and of the broader difficulties with deeming it to constitute an "aggravated felony."

Action for Childhood Arrivals (DACA). At the age of 19, Smith began dating an underage girl in a relationship that was approved of and supported by both families. The couple had a child together and Smith worked to support the child. When police learned of the relationship, however, they charged Smith with "criminal sexual conduct" in violation of Minn. Stat. § 609.344, subd. 1(b). At sentencing, Smith was detained by immigration and subjected to an order of expedited removal. The immigration judge was not permitted to exercise discretion to cancel the removal. Setting aside the consequences to Smith—who is now in Mexico—the person hurt most by this lack of discretion is Smith's U.S. citizen child. The child has lost Smith, both as a father and a source of support, and is now receiving public assistance benefits.

Another noncitizen, who we call Jones, was 20 years old. His girlfriend told him, falsely, that she was 17.[10] She became pregnant, and Jones supported her financially during the pregnancy. After the birth, the hospital reported Jones to the police without the knowledge or consent of the girlfriend. Although the girlfriend refused to cooperate with the investigation, Jones was arrested and pleaded guilty to an attempted violation of N.Y. Penal Law § 130.30(1). Section 130.30(1) is a strict-liability offense prohibiting sexual intercourse between a person under 15 and a person age 18 or older. In the years following his arrest, Jones played a continuous role in his child's life. He supported the mother and child financially, visited the child weekly, and paid for the mother to attend college. Years later, when the government insti-

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[10] Although federal law provides for a mistake of age defense, see 18 U.S.C. § 2243(c), a similar defense was not available under the state law, see N.Y. Penal Law §§ 130.30, 15.20(3).

tuted removal proceedings, the immigration judge determined that Jones's offense constituted "sexual abuse of a minor," foreclosing Jones from discretionary cancellation of removal. Jones remains detained pending petition for rehearing in the Second Circuit. This has been hard on the child, who has a very close relationship with her father. For her part, the mother is supportive of Jones and wishes for him to be free.

Nothing in the INA suggests that Congress intended the "aggravated felony" distinction to apply to low-level offenders like petitioner or these other noncitizens. The categorical denial of discretion to accommodate such cases is inconsistent with the statutory scheme. The conduct that would be covered by Section 1101(a)(43) under the government's reading is, in many cases, the exact opposite of an "aggravated felony." If Congress wishes to extend the devastating consequences of an aggravated felony conviction to such minor state law offenses, it is free to do so. But it is simply wrong to say that it already has.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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